UNIVERSITY OF ALBERTA

WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES: STRENGTHENING THE DISPUTE SETTLEMENT MECHANISM

by

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This thesis is dedicated to –

my parents, Simon and Elizabeth, and to my brother Patrick,
and to Deann Cardinal.

ABSTRACT

The focus of this thesis is the dispute settlement mechanism under the World Trade Organization (hereinafter, WTO). It is argued that certain features of the WTO Dispute Settlement Mechanism (hereinafter, DSM) hinder equal and effective participation by developing countries. These limiting feature are in the areas of remedies and enforcement mechanisms provided under the DSM, third party rights and intervention, and non-participation by private parties in international trade dispute settlement under the WTO. Deficiencies in remedies and enforcement mechanisms provided under the WTO DSM prevent developing countries from enforcing compliance with WTO rules. Third party intervention and rights in the dispute settlement process are severely limited. Excluding private participation from the process opens the system to political interferences that play to the disadvantage of developing countries. It is argued that to ensure equal participation in the DSM calls for strengthening the present DSM under the WTO.

To sustain a more judicial oriented dispute settlement mechanism under the WTO calls for strengthening alternative mechanisms—consultation, mediation, conciliation, and arbitration—for dispute settlement under the WTO. It is, therefore, argued that there is also the need to strengthen existing alternative dispute settlement processes under the WTO.

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INTRODUCTION

The *1994 Agreement Establishing the World Trade Organization*,[1] and its general acceptance by counties, marked a new milestone in the conduct of international trading relations among states. Trading relations among states date back centuries when merchants conducted trading activities from state to state and later developed rules to regulate those trading activities. As Petersmann notes "international trade law is as old as the history of international trade itself."[2] However, efforts at providing a formal legal regime for regulating international trading activities among states started with the *General Agreement on Tariffs and Trade 1947*[3] (hereinafter, *GATT 1947*).

The *GATT 1947* was entered into by 23 countries to provide a legal regime to regulate trading relations among them in an effort to achieve a free, fair, open and transparent trading system, and, more importantly, to avoid discriminatory treatment in the international trading system; to lower tariffs; and to eliminate non-tariff barriers to trade. The Eighth Multilateral Trade Negotiation held from September 1986 to January 1995 under the *GATT 1947* resulted in the establishment of the WTO to regulate international trade activities. As did *GATT 1947*, the WTO provides for a rule-oriented international

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[1] *Agreement Establishing the World Trade Organization*, 15 April 1997, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, at 9, GATT Doc. MTN/FA.

[2] Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (The Hague: Kluwer Law International, 1997) 5 at 5.

[3] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187.

trading system aimed at substantial reduction of tariffs and other barriers to trade and at the elimination of discriminatory treatment in international trade relations.

The operation of a rule-oriented trading system among countries with different interests and different levels of economic development, particularly as between developed and developing countries, led to a number of disputes in the application and interpretation of the rules. An efficient DSM is a central element to a multilateral rule-oriented trading system. The development of an efficient DSM is especially important to developing countries as their use of unilateral measures to ensure effective operation and application of agreed rules is more limited than are the opportunities available to developed countries in that regard. The thesis does not seek to address the question of whether the operation of specific WTO rules is beneficial to developing countries. Instead, it focuses on the effectiveness of the DSM in resolving an international trade dispute between developing countries and developed countries.

The DSM developed under the multilateral trading system has transformed over the years, from a forum of diplomatic negotiation and settlement of GATT disputes to a framework of judicial dispute settlement. It is argued here that a judicial DSM provides a better mechanism for developing countries to resolve disputes that may arise concerning the operation and application of WTO rules. First, such a legal framework provides an impartial standard for evaluating government policies according to rules accepted by all participants. Second, judicial DSM makes international trade law the standard for reaching an agreement. Third, developing countries' use of shared legal framework

facilitates finding allies with related interests to support the case. Last, the long-term economic interest in supporting the rules encourages compliance under a judicial DSM without the need to resort to unilateral action. In other works, without a judicial framework, developing countries are likely to encounter: resistance to the negotiation of trade problems from powerful countries; the use of arbitrary standards in resolving trade disputes; limited interest from third countries in their trade problems; and the lack of leverage in settling trade disputes.

It is further argued that though the DSM under the WTO is more judicial in nature, and thus provides a better mechanism than did the system under the *GATT*, certain aspects of the WTO DSM, however, fall short of the judicial DSM required to ensure equal and effective participation by developing countries. Correcting these deficiencies, and thus providing a much stronger judicial DSM, will create a level playing field for developing and developed countries effectively to utilize the mechanism for resolving WTO disputes.

Remedies provided under the WTO DSM do not remedy economic damage caused by violation of WTO obligations. Developing countries, with their already fragile economies, are more adversely affected by this deficiency. The enforcement mechanisms provided under the WTO DSM depend on power-related factors that play to the disadvantage of developing countries, in a contest between them and developed countries. The rules on third party rights and intervention in dispute settlement processes are inadequate in ensuring effective third party participation. Developing countries participate more as third parties in WTO dispute settlement process and are more affected

by these inadequacies. The WTO DSM provides for an inter-state dispute settlement system that excludes private participation. Excluding private parties from the dispute settlement process, leaving the process in the hands of governments, introduces power politics in the dispute settlement process that put developing countries at a disadvantage. Strengthening the WTO DSM, to provide for a stronger judicial framework that encourages developing countries' participation, requires correcting deficiencies in these areas of the WTO DSM.

A stronger judicial DSM under the WTO further requires the development of efficient and effective alternative mechanisms for the settlement of certain trade disputes not susceptible to successful and effective settlement through the judicial framework. In other words, to sustain a stronger judicial DSM under the WTO, as required for the effective participation by developing countries, requires providing effective alternative dispute settlement mechanisms under the WTO. It is argued that the alternative mechanisms provided for settling WTO disputes are ineffective due to the lack of procedural rules and the absence of an institutional framework for conducting dispute settlement through these processes.

The thesis is divided into four chapters. Chapter one explores the history and present circumstances of the DSM from the GATT era to the WTO regime, with specific focus on the improvements made to the DSM under the WTO and how those improvements better encourage developing countries' participation. Chapter two examines remedies and enforcement mechanisms provided under the DSM. The argument in this chapter is that

the remedies and enforcement mechanisms fall short of effective remedies and enforcement mechanisms needed by developing countries to ensure compliance with WTO rules. Chapter three, divided into two sections, analyses third party rights and intervention in WTO dispute settlement process and participation by private parties in the dispute settlement process. The aim of the first section is to show that the present rules on third party intervention and rights in dispute settlement are inadequate in ensuring effective participation. As developing countries participate more as third parties in dispute settlement process, they are more adversely affected by the limitations of these rules. It is argued in the second section of chapter three that private participation in the DSM limits political influence in the process and that this limitation decreases resort to political manoeuvres to settle international trade dispute by developing countries. The final chapter reviews the alternative mechanisms provided under the WTO DSM and points to the need to provide detailed rules to ensure an effective and efficient alternative dispute settlement mechanism. As noted earlier, a stronger judicial DSM under the WTO requires effective alternative dispute settlement mechanisms.

The aim of the thesis is not to argue for any differential treatment for developing countries in the dispute settlement process. Strengthening the WTO DSM to provide for a stronger judicial DSM does not confer any particular advantage on developing countries. Instead, a level playing field is created for both developing and developed countries to equally and effectively participate in the process. In that regard, the term developing countries is used here in the same way as used in the various WTO agreements, and this includes countries that are referred to as 'least-developed countries'. GATT Article

XVIII:1 defines developing countries as "[t]hose contracting parties the economies of which can only support low standards of living and are in the state of development." The status however is largely based on the principle of self-election. That is, the status—being referred to as a developing country—is chosen by governments based on economic development indicators of the country. The term as used here includes countries satisfying the above definition, the self-elected ones and least-developed countries.

CHAPTER ONE

INTERNATIONAL TRADE AND DISPUTE SETTLEMENT UNDER WORLD TRADE ORGANIZATION

INTRODUCTION

Trading relations among states date back a number of centuries. However, efforts to regulate international trading relations began only in the last century, after the Second World War. The first attempt was to provide rules to regulate multilateral trade among states in order to liberalize trade for economic development. The result was the adoption of the *GATT 1947* on 1st January 1948. The success of this *Agreement* was the creation of the WTO and the adoption of the various Multilateral Trade Agreements and Plurilateral Agreements annexed to the *WTO Agreement* on 1st January 1995. About 146 countries are parties to the *WTO Agreement*, two-thirds of which are developing countries. This chapter provides an historical account of the creation of the WTO from its GATT origin.

The GATT/WTO provides for a multilateral trading system based on rules. Disputes are bound to arise in the operation and application of these rules among states with different interests and levels of economic development. A DSM evolved under the *GATT 1947* to resolve trade disputes arising out of the application of the *Agreement*. With the creation of the WTO, a new perspective was taken to the DSM. The dispute settlement process under the WTO has taken a more judicial approach than the process under the GATT. This chapter provides a comparative description of the two dispute settlement mechanisms, emphasizing the particular improvements introduced under the new mechanism that put the process on a more judicial footing.

THE WORLD TRADE ORGANIZATION AND DEVELOPING COUNTRIES

The WTO came into existence on 1st January 1995 as a successor to *GATT 1947* and with expanded responsibilities for international economic affairs. The Uruguay Round that gave birth to the WTO was the eighth and the last of such Multilateral Trade Negotiations under the auspices of the *GATT*. In that regard, the birth of the WTO marked the crowning moment of efforts directed at trade liberalization through an open, free, and fair trading system started in 1946 by 23 countries[4] culminating in the adoption of *GATT 1947*.

The development of a system of international trade cooperation can be traced to the period between the two World Wars and to the "Great Depression" of the 1930s.[5] According to Thomas and Meyer:

> [o]ne notable aspect of the Depression was a substantial reduction in global trade. This reduction was due primarily to increased tariffs and other trade restrictions, as many countries adopted 'beggar-thy-neighbour' policies in attempts to improve their own economies by restricting imports. These attempts, however, had the opposite effect and were generally considered to have prolonged the Depression.[6]

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[4]Namely: Australia, Austria, Belgium, Brazil, Burma, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Sri Lanka, Syria, United Kingdom, United States of America, and Zimbabwe.

[5]Jeffrey S. Thomas & Michael E. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Toronto: Carswell, 1997) at 2.

[6]Ibid.

The aftermath was a realization of the need for international cooperation on trade matters. A rule-oriented system of international cooperation on trade matters was adopted under *GATT 1947*. *GATT 1947* was to promote free international trade by establishing rules that limit national impediments to trade, particularly focusing on removing tariffs and non-tariff barriers to trade, in an effort to liberalize trade.

GATT 1947 was supposed to be a temporary agreement that was to be rolled into the *International Trade Organization Charter*[7]—negotiated under the UN Conference on Trade and Employment in Havana, Cuba in November 1947. To provide for the temporary application of the concessions negotiated under *GATT 1947*, pending the adoption of the *ITO Charter*, it was implemented under the *Protocol of Provisional Application*.[8] The *ITO Charter* was never adopted, but *GATT 1947*, despite this birth defect, continued in force and provided the platform for multilateral trade negotiations leading to the birth of the WTO. Jackson, writing on this phenomenon in 1967, stated that:

> [d]espite the lack of an institutional framework, despite lack of financial support except of the most meager sort, and despite powerful forces for trade protectionism which killed the International Trade Organization (ITO) and tried to kill GATT, GATT survived. The fact that GATT did survive, and that

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[7] *Final Act and Related Documents, United Nations Conference on Trade and Employment*, April 1948. UN Doc. ICTO/1/4 and E/CONF.2/78.

[8] 55 UNTS 308.

> it has become a major force in international relations today, is not surprising but instructive.[9]

Not only did *GATT 1947* survive, but it also succeeded in performing the role it was supposed to play, namely, liberalization of trade through the elimination of tariff barriers and non-tariff barriers to trade. In addition, though in theory the *GATT* was not a formal institution (in that it contains no provisions providing for institutions to administer rules embodied in the *Agreement*), it provided an institutional framework for the CONTRACTING PARTIES[10] to negotiate trade agreements for international cooperation on trade matters. Eight such multilateral trade negotiations have been held under the *GATT*, the last of which gave birth to the WTO.

The establishment of the WTO, therefore, places the international trading system, hitherto conducted under the *GATT*, on a firm constitutional footing within a well-organized formal institutional framework with legal personality.[11] For the first time, the pillars of the international trading system rest on a fully-fledged international organization with international legal personality. Qureshi argues, however, that:

> it was not so much the creation of an international organization that is noteworthy, but rather the commitment of the international trading community to a fully operational international trading system that it

[9]John H. Jackson, *The Jurisprudence of GATT and The WTO: Insight on Treaty Law and Economic Relations* (United Kingdom: Cambridge University Press, 2000) at 18.

[10]Refers to the collective membership of the *GATT* acting jointly.

[11]Asif H. Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester and New York: Manchester University Press, 1996) at 1.

symbolizes. The establishment of the WTO itself represents in a sense merely a re-focusing of the international community's attitude towards the GATT 1947.[12]

However, the creation of the WTO in itself is also significant for a specific reason. As part of the Uruguay Round, a number of Multilateral Trade Agreements[13] were concluded and adopted by Members and annexed to the *Agreement Establishing the WTO*. In addition, a number of Plurilateral Agreements[14] were also adopted and annexed. The WTO as a multilateral trading organization is to administer, through various committees, these Agreements. The creation of the WTO is, therefore, significant because for the first time in the history of global trade rules, a formal multilateral trading organization was created with power to oversee the implementation and application of these rules and settle disputes.

The WTO was established not only to carry on the objectives of the *GATT* but also with an expanded scope of international economic responsibilities. The Preamble to the *WTO Agreement* provides that the Parties to the Agreement resolve "to develop an integrated, more viable and durable multilateral trading system encompassing past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade

[12]Ibid.

[13]Annex 1A of the *WTO Agreement*.

[14]Annex 4 of the *WTO Agreement*.

Negotiations."[15] The two main objectives of the Parties to the *Agreement* are, first, to enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and non-tariff barriers to trade and, second, to eliminate discriminatory treatment in international trade relations.[16] These objectives are to be pursued with a view to raising standards of living, and to ensuring full employment opportunity, a large and steadily growing volume of real income and effective demand, and expanded production of and trade in goods and services among the Members.[17]

These objectives are, however, subject to three main limitations. First, they are to be pursued in a manner consistent with the optimal use of the world's resources. Second, account must be taken of the need for sustainable development and protection and preservation of the environment. Last, and of much concern here, it is stipulated in the Preamble that the objectives are to be pursued so as to ensure that developing countries, especially the least developed countries, obtain a level of share in the growth of international trade that reflects the needs of their economic development.[18]

Of the 146 Members of the WTO,[19] about two-thirds are developing countries.[20]

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[15]Preamble to the *Agreement Establishing the WTO*, supra note 1.

[16]Ibid.

[17]Ibid.

[18]Supra note 11 at 4.

[19]Membership as of 3 April 2003.

Developing country membership in the WTO is more of a necessity than an option in comparison to the choice available to developed countries. A power-oriented trading system, where inter-state trading activities are regulated not by 'rules' but by the bargaining position of the parties, is more likely to be detrimental to the economies of developing countries. This is mainly due to the power disparity between developed and developing countries. The rule-oriented system provided under the WTO, in a sense, evens out such power disparity, for it seeks to eliminate discriminatory treatment in international trade relations. This is not to deny the influence of power-related factors in the negotiation of trade agreements. A rule-oriented trading system, however, minimizes the effect of those factors. Developing countries, therefore, stand to gain more in an open, free, transparent, and fair trading system based on multilateral trade agreements negotiated between states than from a power-oriented system where much depends on the bargaining chips of the parties.

State Members of the WTO recognize the peculiar economic situation of developing countries. The Preamble to the *WTO Agreement*, therefore, contains a 'statutory' qualification to the manner in which WTO objectives are carried out. Such objectives are to be carried out with the need for positive efforts designed to ensure that developing countries, and especially the least developed countries among them, secure a share of

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[20] *GATT* Article XVIII:1 defines developing countries as "[t]hose contracting parties the economies of which can only support low standards of living and are in the state of development." The status however is largely based on the principle of self-election. The term as used here includes countries satisfying the above definition, the self-elected ones, and least-developed countries.

economic growth in international trade commensurate with the needs of their economic development. This serves as the basis for negotiating discriminatory beneficial treatment for developing countries in a system of trading that prohibits discriminatory treatment in international trade relations.

Over the years, there has been significant increase in developing countries' participation in international trade. Of the 23 original CONTRACTING PARTIES under the *GATT*, eleven were developing countries. This number increased significantly with the attainment of independent status by developing countries in the 1960s. As noted previously, of the present 146 WTO Members, about two-thirds are developing countries. Numerical strength in the multilateral trading system, however, is of little significance without a corresponding increase in terms of participation through the actual use of the system. Different factors influence a country's ability to use the multilateral trading system. One such factor is a well functioning system for enforcing rights and obligations that countries have assumed under the multilateral trading system.

Disputes are bound to arise in every association, national or international. This is particularly so in a multilateral trading system where each Member wants to take advantage of the system to maximize benefits that may accrue to it. In that regard, a well functioning mechanism to ensure that Members play by the rules they negotiate becomes indispensable. Rights and obligations must be respected for the system to function. The *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* (Annex 2 of the *WTO Agreement*) seeks to provide such a mechanism for settling

disputes that may arise among Members in respect to rights and obligations assumed under the various Multilateral Trade Agreements.

TRADE DISPUTE SETTLEMENT UNDER THE WTO.

The WTO dispute settlement provisions are set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter, the *Understanding* or *DSU*), Annex 2 to the *Agreement Establishing the WTO*. The adoption of this dispute settlement mechanism under the *DSU*, it is frequently argued, is one of the major results of the Uruguay Round.[21] This view is based on the understanding that the dispute settlement and enforcement mechanism renders international treaties more effective and credible, and central to maintenance of confidence in the system.[22]

Thomas and Meyer argue that:

> rules, in and of themselves, will not provide effective discipline unless there is some method whereby they can be enforced. The WTO Agreement is no different than any other set of rules in this respect. An effective enforcement and dispute settlement mechanism was therefore considered essential to the Agreement's overall success. Consequently, the dispute settlement and enforcement provisions of the WTO Agreement are often referred to as a cornerstone of the new WTO system.[23]

The importance of a dispute settlement system in WTO cannot then be over-stated. This is reflected in the *DSU* itself when it provides that "[t]he dispute settlement system of the

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[21]John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (Hague: Kluwer Law International, 1999) at 30.

[22]Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System, 1948-1996: An Introduction" in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (The Hague: Kluwer Law International, 1997) 1 at 30.

[23]Supra note 5 at 308.

WTO is a central element in providing security and predictability to the multilateral system."[24]

The present dispute settlement system set forth in the *DSU* is based on about five decades of experience in dispute settlement under the GATT regime. The present system can, therefore, be seen as the present evolutionary stage of the international trade dispute settlement system. The system under the *GATT 1947* was itself an evolutionary process from the two GATT dispute settlement provisions[25] through the codification of practices and various improvements. The WTO dispute settlement system can only be fully appreciated or understood against the background of the GATT jurisprudence in dispute settlement.

Dispute Settlement Under the GATT

The GATT dispute settlement system evolved on the basis of *GATT 1947* Articles XXII and XXIII. These provisions never made mention of the term 'dispute'. This could be attributed to the lack of organizational structure under which the *GATT* was implemented. The drafters of *GATT 1947*, however, foresaw that problems would arise due to the future action and inaction of one or more GATT contracting parties. They, therefore, provided

[24]Article 3.2 of the *DSU*.

[25]Articles XXII and XXIII. These were the main (but not the only) GATT dispute settlement provisions.

for a system of consultation between contracting parties where such situations arose.[26] The first attempt at dispute settlement under Article XXII was by consultation. Consultation was a two-step process. The first was a bilateral consultation between the two disputing contracting parties.[27] Where such bilateral consultation failed, there was a second step multilateral consultation, where the CONTRACTING PARTIES[28] may at the request of a contracting party consult with a contracting party or parties in respect of any matter to which it has not been possible to find a satisfactory solution through the first consultation.[29]

These consultations provided the disputing contracting parties with the opportunity to negotiate either bilaterally (between the disputing parties) or multilaterally (in conjunction with the CONTRACTING PARTIES) in an attempt to find a mutually satisfactory settlement to the dispute. Article XXIII provides that the complaining contracting party may make written representation or proposals to the other contracting party or parties, and that the party or parties approached must give sympathetic consideration to the representation or proposals made to it or them.

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[26]Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organization, Law, Practice, and Policy* (New York: Oxford University Press, 2003) at 19.

[27]Refers to individual member countries of the *GATT*.

[28]Supra note 10.

[29]Article XXII *GATT 1947*.

As a last resort, where no satisfactory adjustment is effected, the matter is referred to the CONTRACTING PARTIES to investigate and make appropriate recommendations to the contracting parties concerned, or to give a ruling on the matter as appropriate.[30] From the early 1950s, the practice was to establish a panel of independent experts to examine the dispute. Disputes were referred by GATT CONTRACTING PARTIES to these *ad hoc* groups of experts who acted as a neutral adjudicating body, not as government representatives. The panels investigated the matter and produced a report. Panel decisions had no official or binding effect, but were referred to the GATT CONTRACTING PARTIES, which adopted the report and made the appropriate recommendation.[31] The decision to establish a panel to look into a dispute and to adopt a panel report was based on the consensus of the CONTRACTING PARTIES. A contracting party (including the losing party) could, therefore, successfully block establishment of a panel or the adoption of panel report.

When the CONTRACTING PARTIES adopted a panel report, there was a recommendation to the contracting party in breach to bring the measure in violation into conformity with the GATT provisions. No time limit was fixed for compliance. Such recommendation was to be implemented in good faith. However, as a last resort, to force a contracting party to comply, the CONTRACTING PARTIES could grant authorization to the complaining party to take retaliatory action by suspending such concessions or

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[30]Article XXIII:2 *GATT 1947*.

[31]Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (New Hampshire: Butterworth Legal, 1993) at 30-31.

obligations under the *GATT 1947* as the CONTRACTING PARTIES determine to be appropriate in the circumstances.[32] A decision to grant such authorization was made by consensus of the CONTRACTING PARTIES, including the party in breach. A contracting party could, therefore, block the grant of such authorization to the 'winning' party to suspend concessions or other obligations.

The GATT panel process of dispute resolution was successful in the sense that GATT disputes were settled under the process, and it was largely utilized by GATT contracting parties. It thereafter became necessary to formalize the *de facto* panel procedure. This led to the adoption of a number of agreements and understandings on dispute settlement to supplement the skeletal approach under Article XXIII. These are *1966 Decision on Procedures under Article XXIII Applying to a Dispute Between a Developing Contracting Party and a Developed Contracting Party* (hereinafter, *1966 Procedure*);[33] and *1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (hereinafter, *1979 Understanding*)[34] and its annexed *Agreed Description of the Customary Practices of the GATT in the Field of Dispute Settlement* as agreed in the Tokyo Round. Further reforms were introduced in the *1982 Declaration on Dispute Settlement Procedures* adopted in the Thirty-Eight Session, held at the Ministerial Level

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[32]Article XXIII.2 *GATT 1947*.

[33]GATT BISD, 14th Supp., (1967) 18.

[34]GATT BISD, 26th Supp., (1979) 210.

in 1982 (hereinafter, *1982 Declaration*)[35] and the *1984 Decision on Dispute Settlement Procedures* adopted at the Fortieth Session (hereinafter, *1984 Decision*).[36] The last reform came in the *1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures* (the *1989 Improvements*)[37] negotiated at the December 1988 Meeting of the Trade Negotiations Committee of the Uruguay Round.

Over the years, the panel adjudication process began to take a more rule-oriented, judicialized approach to dispute settlement. The contracting parties invoked Articles XXIII to vindicate their legal rights under the *GATT* rather than to set in motion a diplomatic negotiation for trade concessions. The panels' recommendations, therefore, rested on legal rather than diplomatic grounds. Adopted panel recommendations were to a large extent implemented and observed by states. According to Matsushita, Schoenbaum, and Mavroidis, this was not due to the threat of suspension of concessions, the enforcement mechanism under the *GATT*, but rather was an accomplishment of the dynamics of the process. A losing party could not ignore a decision based on legal principle. To do so would threaten the entire legal order on which the GATT system was based and which the losing party would need (and might be on the winning side of) in other cases.[38]

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[35]GATT BISD, 29th Supp., (1983) 9.

[36]GATT BISD, 31st Supp., (1985) 9.

[37]GATT BISD, 36th Supp., (1986) 61.

[38]Supra note 26 at 21.

Despite the extensive use of the GATT panel adjudication process, serious shortcomings inhibited its effectiveness. One shortcoming is delays encountered in the adjudicatory process. These included delays during consultation, establishment of panel, panel procedures, and implementation of recommendation. There was also the right of a contracting party to block the establishment of panel and the adoption of panel report, and the grant of authorization to suspend concessions. Further shortcomings were in the areas of available remedies and enforcement mechanism under the *GATT*. In addition, there was the problem of the lack of a specific formal institutional framework to administer dispute settlement under the *GATT*. The series of piecemeal reforms introduced in the agreements and understandings adopted on dispute settlements under the *GATT* did improve somewhat on the system. Despite these improvements, the dispute resolution procedures were confusing in number and were largely uncoordinated.[39]

Dispute Settlement Under the WTO

With the creation of the WTO, coupled with about five decades of experience in dispute settlement under the GATT regime, the stage was set for the next evolutionary process of the international trade dispute settlement system. A more legal, rule-oriented, judicial DSM was adopted under the *WTO Understanding*. The process leading up to the establishment of the WTO DSM has been described by Mavroidis as follows:

> In the negotiations leading to establishment of the WTO dispute settlement mechanism, the debate focused on whether a negotiation approach (as was the practice under the GATT) would be a superior to a more legalistic rule-

[39]Amelia Porges, "The New Dispute Settlement: From GATT to the WTO" (1995) 8 Leiden Journal of International Law 115 at 118.

> oriented approach. Fears were expressed that reforms to give primacy to legal rules would invariably impair the WTO's credibility because powerful states would invariably ignore the rules when they go against their national interests. For better or worse, the judicialized, rule-oriented approach to dispute resolution has prevailed at the WTO.[40]

As expanded on in the next section, the DSM under the WTO is based on a judicialized rule-oriented approach because of the improvements introduced under the *DSU*. The dispute settlement process under the *DSU* is unified with a specific formal institution to administer the process. The dispute settlement processes now follow automatically without the power of any member to block the process. A standing appellate review mechanism has been introduced into the process. The emphasis under the *DSU* is more on legal principles than on negotiation and compromise, as was the practice with the negotiation approach to dispute settlement under the GATT regime. It should, however, be noted that most of these improvements started under the *GATT*.

Article 3.1 of the *DSU* affirms the application of Articles XXII and XXIII of *GATT 1947*. The consultation procedures have been continued in force and elaborated on under the *DSU*.[41] Where a Member alleges that there is infringement of an obligation under any of the covered agreements (violation complaints) or that any measure taken by another Member impairs or nullifies any benefit accruing to that Member (non-violation complaints), the dispute settlement process under the *DSU* is set in motion by making a representation to the concerned Member for consultation. It is the duty of the Member so

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[40]Supra note 26 at 21-2.

[41]Article 4 *DSU*.

requested to afford sympathetic consideration and adequate opportunity for consultation.[42] Where such consultation fails, the complaining party has the right to request the establishment of a panel.[43] Another avenue open to the parties under the *DSU* to mutually settle the dispute is to make use of the good offices (the only office provided is that of the Director General of the WTO), conciliation and mediation processes provided under Article 5 if the parties to the dispute so agree.

Establishment of a panel follows where the parties fail to reach any satisfactory adjustment either during consultation or through the use of the good offices, conciliation, or mediation. The panel is established at the complaining party's request unless the Dispute Settlement Body (hereinafter, DSB)[44] by consensus decides otherwise.[45] The request must, however, be in writing and must indicate whether consultation was held, and must in addition "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[46]

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[42]Ibid. section 2.

[43]Ibid. section 7.

[44]The Dispute Settlement Body is the institution established under Article 2 to administer the *DSU*.

[45]Article 6.1 *DSU*.

[46]Ibid. section 2.

The panel is then established with the standard term of reference as provided in Article 7.1[47] unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel. The panel is composed from a list maintained by the Secretariat[48] and is comprised of three panelists unless the parties to the dispute agree to five panelists within 10 days of the establishment of the panel.[49] The Secretariat nominates the panel, and the parties to the dispute can only oppose such nominations based on compelling reasons.[50] Where the parties cannot agree on the panel within 20 days of establishment, the Director-General, in consultation with the Chairman of the DSB, shall determine the composition of the panel by appointing the panelist considered most appropriate.[51] The function of the panel is to "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreement."[52] In that regard, "[p]anels should consult

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[47]"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document...and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[48]Article 8.4 *DSU*.

[49]Article 8.5 *DSU*.

[50]Ibid. section 6.

[51]Ibid. section 7.

[52]Article 11 *DSU*.

regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."[53]

After making such assessment, the panel issues a report which is submitted to the DSB for adoption. Parties to the dispute can appeal against findings made in the panel report to a standing Appellate Body. The panel report must be adopted by the DSB within 60 days of the date of circulation, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[54] The *DSU* introduces an Appellate Review into the dispute settlement process. A standing Appellate Body is established, composed of seven persons, three of whom serve as an appellate panel to hear appeals from panel reports.[55] Appeal is however limited to issues of law covered in the panel report and legal interpretations developed by the panel.[56] Upon inquiring into the matter, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.[57] Its report is adopted automatically by the DSB

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[53]Ibid.

[54]Article 16.4 *DSU*.

[55]Article 17.1 *DSU*.

[56]Ibid. section 6.

[57]Ibid. section 13.

and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report.[58]

The main remedy, where it has been found that a measure is inconsistent with a covered agreement, is a recommendation to the Member concerned to bring the measure into conformity with that agreement.[59] Article 21.1 provides that '[p]rompt compliance with recommendations or rulings of the DSB is essential to ensure effective resolution of the disputes to the benefit of all Members." The Member concerned is therefore to inform the DSB within 30 days of the adoption of the report, of its intention to implement the recommendations and rulings of the DSB;[60] and implementation is monitored by the DSB.[61] Where the Member fails to implement the recommendation or ruling within reasonable time, at the request of the complaining party, the DSB shall grant authorization for the suspension of concession to the party in breach. Alternatively, the party in breach may negotiate with the complaining party, with a view to developing mutually acceptable compensation.[62] Compensation and suspension of concessions are,

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[58]Ibid. section 14.

[59]Article 19.1 *DSU*.

[60]Article 21.3 *DSU*.

[61]Ibid. section 6.

[62]Articles 22.1 and 22.2 *DSU*.

however, temporary measures pending full implementation of recommendation; and compensation is voluntary.[63]

[63]Ibid. section 1.

SPECIFIC IMPROVEMENTS UNDER THE WTO DSU

The rule-oriented judicialized dispute settlement mechanism created under the WTO, in the writer's view, serves the needs of developing countries far more than did the negotiation, power-oriented system of dispute settlement under the GATT regime. This is so mainly because the rule-oriented judicialized dispute settlement system decreases the risk that legal obligations will be hampered by economic and political pressures. Under the rule-oriented judicialized DSM, disputes are settled based on legal rules rather than on compromise, which was the practice under the negotiation approach. Negotiation of settlement is more prone to outside factors—be it economical, political, or diplomatic factors—than agreed rules. This is not to deny the influence of these factors on the rules themselves, nor is it to deny the effect those factors may play outside the rule-oriented judicialized dispute settlement process. The assertion made here is that the effect of those factors in the process itself is minimized. Since developing countries are more at the receiving end of those factors in the process, they are more favorably affected by the decrease in those factors.

As provided by Article 3.2 of the *DSU*, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members . . ." Article 3.3 further provides that "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the

effective functioning of the WTO and the maintenance of proper balance between the rights and obligations of Members."

Improvements made to the WTO Dispute Settlement Mechanism that put the system on a more judicial path for settlement of disputes are discussed under the following headings:

Unified System

The *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* provides a single, unified and comprehensive system of dispute settlement covering all Multilateral Trade Agreements[64] and, subject to certain conditions, the Plurilateral Trade Agreements.[65] Under the pre-WTO regimes, dispute settlement mechanisms were dispersed in different agreements, namely *GATT 1947* provisions, *1966 Decision*, *Tokyo Round Codes*, *1982 Decisions*, *1984 Decisions*, and *1989 Improvements*. In addition, a specific dispute settlement mechanism existed under different trade agreements. Membership and procedures differed from mechanism to mechanism.

The *WTO Understanding* established an integrated dispute settlement mechanism for the entire WTO system. The wide coverage of the *WTO Understanding* reaches from

[64]Article 1 *DSU*.

[65]The applicability of the *Understanding* to the Plurilateral Trade Agreements is subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the *Understanding* to the individual agreement, including any special or additional rules and procedures for inclusion in Appendix 2, as notified to the DSB. *See* Appendix 1(C) of the *DSU*.

traditional goods to new areas, including services and intellectual property, and embraces disputes arising from the *Understanding* as well as the *WTO Agreements*. However, the WTO DSM applies only to disputes arising between WTO Members after the entry into force of the WTO.[66] The system, therefore, provides a comprehensive framework for dispute resolution in the field of international trade under the auspices of the WTO.

However, many Multilateral Trade Agreements—such as the *Agreement on the Application of Sanitary and Phytosanitary Measures*, the *Agreement on Implementation of Article VII of the GATT 1994*, the *Agreement on Textiles and Clothing*, the *Agreement on Technical Barriers to Trade*, the *Agreement on Subsidies and Countervailing Measures* (all these agreements form part of Annex 1A of the *WTO Agreement*), and certain Plurilateral Trade Agreements—continue to include special dispute settlement rules and procedures. These provisions are listed in Appendix 2 to the *DSU*, "Special or Additional Rules and Procedures Contained in the Coverage Agreements." The *DSU* harmonizes the application of these provisions with the rules and procedures under the *Understanding* by providing that the *DSU* is the central dispute settlement procedure and that "to the extent that there is a difference between the rules and procedures in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail." The new WTO DSM is thus a unified system with a considerably extended scope of jurisdiction.

[66]Article 3.11 *DSU*.

Institutional Framework

Directly related to the unified dispute settlement procedure, is the specific independent formal institutional framework provided under the *Understanding* to administer the rules and procedures under the *DSU*. Article 2.1 established the Dispute Settlement Body to administer the *DSU*. "Accordingly, the DSB [. . .] have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."[67]

The DSB is, however, the same as the General Council of the WTO, which is made up of representatives of all WTO Members, except that the DSB has its own chairman and follows separate procedures from the General Council. This prevents the administration of the dispute settlement mechanism by the CONTRACTING PARTIES, which in many ways added to delays in dispute settlement under the GATT regime. A specific designated institution responsible solely for dispute settlement under the WTO provided the independent and specific institutional framework advocated for by developing countries under the GATT DSM.

Time Frame

Under the *WTO Understanding*, specific and precise time frames are set for all the processes of dispute settlement, from consultation to authorization to take retaliatory measures against a Member in breach of WTO obligation. One factor contributing to the

[67]Article 2.1 *DSU*.

unattractive character of dispute settlement under the *GATT* for developing countries was the long period associated with the various processes of dispute settlement. The *WTO Understanding* avoids these delays because, as is said in all judicial systems, justice delayed is justice denied. A specific time frame is provided to respond to a request for consultation[68] and consultation is to commence within 30 days.[69] Further, settlement during consultation should be arrived at within 60 days or the complaining party may request the establishment of a panel.[70]

The *Understanding* also sets a timetable for the proceedings of a panel.[71] To avoid delays in the appointment of a panel, Article 8.7 provides that "[i]f there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB . . . shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate." Delays associated with agreements on the terms of reference of the panel are also avoided. Article 7.1 provides for the use of a standard term

[68]Article 4.3 *DSU*. The party requested must respond within 10 days after the request.

[69]Ibid.

[70]Ibid. section 7. Article 4.8 provides shorter time frames in cases of urgency, including those relating to perishable goods.

[71]Article 12.8 provides that "from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties of the dispute, shall as a general rule not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its reports within three months."

of reference, unless the parties otherwise, agree within 20 days of the establishment of the panel.

Panel reports are also to be adopted within a specific time frame.[72] On implementation of DSB recommendations, the *Understanding* provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."[73] The Member to whom the recommendation is directed must therefore inform the DSB within 30 days of the adoption of the recommendation of its intentions with regard to implementation of the recommendation.[74]

In all, the *WTO Understanding*, in comparison with the GATT DSM, provides a more tightened time frame within which disputes between Members should be settled. This avoids the delays encountered under the GATT regime. The long time period needed for dispute settlement under the GATT DSM tended to be particularly onerous on developing countries, and discouraged their participation because of the high cost involved, the personnel and resources needed, and, more importantly, the adverse economic

[72]Article 16.4 provides that the report must be adopted within 60 days unless the DSB decides by consensus not to adopt the report or a party to the dispute formally notifies the DSB of its intention to appeal. Article 20 also provides that the period from the establishment of the panel to the date the DSB considers the report shall not exceed 9 months if there is no appeal, and 12 months if there is an appeal.

[73]Article 21.1 *DSU*.

[74]Ibid. section 3.

repercussions of the dispute. The specific and precise time frame for dispute settlement under the WTO is, therefore, likely to increase developing countries' resort to the system to enforce their rights under the various trade agreements. Under the GATT regime, out of a total of 236 GATT dispute settlement matters, only 38 of them has been initiated by developing countries, i.e. about 16.1 percent of the total. In comparison to the first three years of the WTO (figures as of 25 April 1997), out of 74 dispute settlement matters, 33 has been initiated by developing countries, i.e. about 44.6 percent of the total. Thus, the numerical participation of developing countries in the WTO dispute settlement system has increased by 28.5 percent under the WTO.

Automatic Processes

It is the writer's assertion that, an improvement in the dispute settlement process is the elimination of the power of a contracting party or parties to block the process. Due to the judicialized nature of the WTO DSM, much of the dispute settlement procedures now follow automatically without the opportunity for a Member to block proceedings, as was the practice under the GATT regime. This is due to the introduction of the "negative consensus" rule into the decision making process of the DSB, which replaced the consensus approach under the GATT regime, according to which CONTRACTING PARTIES can only act on consensus. Under the present decision making process, the DSB must act, unless there is a decision by consensus not to act.

This is of particular advantage to developing countries considering the power disparity between them and developed countries. In the history of dispute settlement under the

GATT, the power to exercise a 'veto' to block the dispute settlement process have only been used by developed countries. This is because developing countries are generally unable to resort to unilateral action to ensure compliance with GATT rules where developed countries are violators. Conversely, developing countries did not exercise the power to block dispute settlement process where they are the violators because compliance can be ensure through the use to unilateral measures by a developed country who alleged the violation. The *DSU* eliminates such unequal use of power.

Decisions on the establishment of a panel or the adoption of panel reports under the GATT system are based on consensus of the CONTRACTING PARTIES. The *WTO Understanding*, however, adopts the opposite approach: a decision to establish or adopt a panel report follows automatically, unless the DSB by consensus decides not to establish a panel or adopt a panel report. Where there is no satisfactory adjustment during consultation, at the request of the complaining Member, "a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."[75] In the same vein, the *Understanding* provides that "[w]ithin 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless . . . the DSB decides by consensus not to adopt the report."[76] The right to block the establishment of a panel or adoption of a panel report can no longer

[75]Article 6.1 *DSU*.

[76]Article 16.4 *DSU*. The report would also not be adopted where a party to the dispute notifies the DSB of its decision to appeal.

be exercised by the party against whom the complaint is made (or any individual or group of Members). That power can only be exercised based on consensus. Developed countries can no longer 'veto' decisions that go against them, even where the complaining party is a developing country with a weaker economic power to take any unilateral action. This ends the power disparity that existed under the GATT regime.

Under the GATT DSM, a defendant party who failed to implement recommendation could also block agreement authorizing the other party to take retaliatory measures by suspending concessions or other obligations under the covered agreements. Under the WTO Understanding, where a defendant party fails to implement a recommendation, upon request by the complaining party, the DSB shall grant authorization to suspend concessions or other obligations unless the DSB decides by consensus to reject the request.[77]

The sum effect of these measures is the elimination of the power to block panel processes, a practice that was particularly inimical to developing countries' use of the dispute settlement mechanism and discouraged participation in the GATT dispute settlement process.

Third Party Rights

One complaint of developing countries against the GATT DSM was that bilateral settlement of disputes amounted to a deviation from legalism as the philosophy

[77]Article 22.6 *DSU*.

underpinning the process of dispute settlement. The argument was that the lack of third party intervention in dispute settlement processes encouraged a situation where matters under the general domain of the *GATT* were settled bilaterally rather than through the GATT multilateral mechanism.[78]

The first attempt to provide a framework for the evolving practice of third party intervention was under the *1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.*[79] The *1989 Decision on the Improvements to the GATT Dispute Settlement Rules and Procedures* included more detailed rules on third party rights,[80] and these provisions have been reproduced as the first two sections of Article10 of the *DSU* on third party rights.

The WTO *Understanding* provides that the interest of the other Members must be fully taken into account during the panel process.[81] Further, "[a]ny Member having a

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[78]Kofi Oteng Kufour, "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Dispute" (1997) 31(5) Journal of World Trade 117 at 137.

[79]The GATT Secretariat adopted a procedure under which a party having substantial interest in a matter under consultation could join the consultations if the contracting party to whom the request was directed agreed that the third party had substantial interest in the matter. If not, then the third party must refer the matter to the CONTRACTING PARTIES.

[80]Para. F(e) of the *1989 Improvements* supra note 32.

[81]Article 10.6 *DSU*.

substantial interest in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."[82] Paragraph 3 of Article 10 further boosts third party rights by providing that '[t]hird parties shall receive the submissions of the parties to the first meeting of the panel." Third parties are therefore granted automatic access to the submissions, and are entitled to receive these prior to the commencement of the panel proceeding. Thus, informed intervening third parties may proceed to table their submissions.

These provisions are backed by the working procedures, contained in Appendix 3 to the *DSU* at sections 6, 9 and 10. In particular, section 6 permits the presence of third parties, which have notified the DSB of their interest in the dispute, not only to present their views during the first substantive meeting of the panel, but also to be present throughout the entire session. Where a measure already subject to panel proceeding nullifies or impairs benefits accruing to a third party under any covered agreement, that party may have recourse to normal dispute settlement procedures under the *DSU*, and such dispute must be referred, where possible, to the original panel.[83]

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[82]Ibid. section 2.

[83]Article 10.4.

The *DSU* also introduces two other elements to promote third party rights in dispute settlement. The first is the right of WTO Members to be included in consultations involving other Members, as a Member with a "substantial interest."[84] The second is that third parties have a right to appear in appeal proceedings under Article 17.4 of the *DSU*,[85] provided that they have notified their "substantial interest in a matter" under Article 10.2 of the *DSU*. They may in accordance with Article 17.4 make submissions and be given the opportunity to be heard by the Appellate Body.

These provisions enhance transparency in the dispute settlement process, thus promoting the integrity of the WTO DSM. The procedure also encourages developing countries collectively to initiate complaints and pursue settlements favorable to their collective interest. Measures taken by a developed country that is inimical to the interest of developing countries and contrary to any of the covered agreements can be subjected to the WTO DSM by one developing country as a complaining party, together with other developing countries as third parties. Such collective effort narrows the power disparity and, at the same, time provides a unified avenue to address the issue.

Appellate Review

One innovation to the dispute settlement process introduced under the *WTO Understanding* is the establishment of an Appellate Review System. A party to a dispute

[84]Article 4.11.

[85]Article 17.4 however limits the right of appeal to only the parties to the dispute, and not third parties.

can appeal against the findings of a panel to an Appellate Body. At the national level, appeals are part of the judicial systems, civil and common law alike, of all countries. An appeal process is one element of a liberal democratic tradition. The availability of appeals is usually justified on grounds of the fallibility of judges (in this case, panelists), enhanced justice, social and international acceptability of judgments, legal consistency, and unity of the legal systems.[86] As McRae rightly notes:

> [t]he creation of an Appellate Body under the WTO was part of a *quid pro quo* under which states accepted that the WTO panel process was to become more streamlined and in effect, binding. A binding process runs the risk that states will have to live with a "wrong decision" reached by WTO panels. The appellate procedure offers the opportunity of having "wrong decisions" corrected.[87]

The establishment of the Appellate Review System is, therefore, in line with the effort of legalization and judicialization of the international trade dispute settlement system under the WTO.

The *Understanding* establishes a Standing Appellate Body of seven persons, three of whom serve on any one case, to hear appeals from panel reports.[88] To guarantee the impartiality of the Appellate Body, the *Understanding* provides that persons appointed

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[86]Ernst-Ulrich Petersmann, "How to Promote the International Rule of Law? Contribution by the WTO Appellate Review System" in James Cameron & Karen Campbell, eds., *Dispute Resolution in the WTO* (London: Cameron May, 1998) 75 at 85-86.

[87]Donald M. McRae, "The Emerging Appellate Jurisdiction in International Trade Law" in James Cameron & Karen Campbell, eds., *Dispute Resolution in the WTO* (London: Cameron May, 1998) 75 at 100.

[88]Article 17.1 *DSU*.

shall be unaffiliated with any government and shall be recognized authorities, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally.[89] The Appellate Body's jurisdiction is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[90] "The Appellate Body, after hearing the appeal may uphold, modify or reverse the legal findings and conclusions of the panel."[91] Its report is automatically adopted by the DSB and unconditionally accepted by the parties to the dispute, unless by consensus the DSB decides not to adopt the report.[92]

As argued earlier, a rule-oriented dispute settlement mechanism is more favorable to developing countries use of the process, than a power-oriented system. The establishment of the Appellate Body under the WTO dispute settlement system reinforces the shift away from power-related factors towards rules, a shift that favors developing countries in terms of dispute settlement. As explained earlier, the rule-oriented dispute settlement system minimizes the influence of power-related factors—economic, political, diplomatic, etc—in the process. This ensures that disputes are settled based on legal rules than on the negotiation of compromise outside the scope of the rules agreed upon.

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[89]Ibid. section 3.

[90]Ibid. section 6.

[91]Ibid. section 13.

[92]Ibid. section 14.

Remedies and Enforcement Measures

The dispute settlement provisions of *GATT 1947* and *Tokyo Round Codes* contained no specific provisions for prescribing remedies in cases of violations. Withdrawal of inconsistent measures, however, emerged as the usual remedy through GATT jurisprudence which was codified in paragraph 4 of the *1979 Understanding*. Thus, GATT panels commonly recommended that the losing party withdraw its inconsistent measures or bring them into compliance.

In continuing the practice under the *GATT*, the *DSU* provides that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned brings the measure into conformity with that agreement." The provision further provides that "[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendation."[93] Article 19.2 provides a caveat that the panel and Appellate Body's findings and recommendation "cannot add or diminish the rights and obligations provided in the covered agreements."[94]

The primary enforcement mechanism where a Member fails to bring its measures into conformity with a covered agreement as recommended by the DSB is the grant of authorization to the complaining Member to take retaliatory actions by suspending concessions or other obligations to the Member concerned. This practice was carried over

[93] Article 19.1 *DSU*.

[94] The section in effect limits the scope of the findings and recommendations of the Appellate Body.

from the GATT jurisprudence. Under the negative consensus rule, a request for authorization to suspend concession is granted unless the DSB by consensus agrees not to authorize the suspension.[95] An innovation under the *DSU* is compensation, in cases where the Member concerned cannot immediately bring the inconsistent measures into conformity with the covered agreement.[96] Compensation is a voluntary measure open to the Member in breach to avoid the grant of authorization to suspend concession to the complaining party.[97]

Under the GATT enforcement process, bringing pressures to bear on the defendant to bring its measure into compliance with GATT obligation was left to the persistence of the complainant. The complainant had to place the issue on the agenda of the GATT Council, make demand for compliance, and eventually threaten retaliation. Each initiative is seen as an unfriendly act. The *DSU* contains automatic steps that do not require the complainant to propel the process. Article 21.3 requires the Member concerned to inform the DSB of its intentions as regards the implementation of the recommendations and rulings of the DSB. The provision provides further that a reasonable time for compliance must be fixed, by arbitration if necessary, at the latest by the 90th day after adoption of the panel or Appellate Body report. And, finally, Article 21.6 establishes an automatic surveillance mechanism by requiring the defendant to give status reports in writing of its

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[95]Article 26.6 *DSU*.

[96]Ibid. section 1.

[97]Ibid. sections 1 and 2.

progress in implementing the recommendations or rulings to the DSB, at regular intervals.

Special and Differential Treatment Provisions

As with other WTO agreements, the *Understanding on Rules and Procedures Governing the Settlement of Disputes* contains a number of special and differential treatment provisions applicable to developing countries. The *DSU* contains eleven sections on special and differential treatment applicable in dispute settlement between developing and developed countries.

The inclusion of these provisions in the *DSU* is recognition of the unequal litigation strength between developing and developed countries in dispute settlement under the WTO. Related to that is the recognition "that there is need for positive efforts designed to ensure that developing countries . . . secure a share in the growth in international trade commensurate with the needs of their economic development."[98] Special and differential treatment provisions for developing countries was intended to protect them in order to meet their development objectives.

The *DSU* thus provides for the inclusion of one panelist from a developing country where the dispute is between a developing and developed country,[99] and prescribes that panels

[98]Preamble to the *WTO Agreement*.

[99]Article 12.10.

should provide in their report how they took into account the relevant provisions on differential and more-favorable treatment for developing countries.[100] Developing countries can invoke, as an alternative to the provisions contained in Articles 4, 5, 6, and 12 of the *DSU*, the corresponding provisions of the *1966 Decisions*. The *1966 Decisions* provided a more expedited proceeding in the dispute settlement processes.[101] Article 21.7 empowers the DSB to take further actions as appropriate in addition to the general recommendation to the Member in breach to bring its measures in compliance with the agreement; and in considering what appropriate action might be taken, the DSB must take into account not only the trade coverage of measures complained of, but also their impact on the economy of the developing country. Article 24 provides for special procedures involving least-developed country Members, and Article 27.2 requires the Secretariat to make available qualified legal experts to provide additional legal advice and assistance in respect of dispute settlement to developing country Members.

[100]Ibid. section 11.

[101]Article 3.12.

CONCLUSION

The DSM provided for under *GATT 1947* was based on a negotiation approach where settlements are negotiated and compromise arrived at based not only on legal rules but other factors such as political, economic, and diplomatic pressures. Over the years, the process under the GATT evolved in the direction of a rule-oriented judicialized DSM. A process that assumed a somewhat full status under the WTO *DSU*. Under a rule-oriented judicialized DSM, settlements are based on legal rules. Though the influence of other related factors—economic, political, diplomatic, etc—are not totally eliminated, their effect are minimized under a rule-oriented process.

A number of improvements have been made to the DSM under the WTO *DSU* that put the process on a more judicial footing than was the case under the GATT. These include the comprehensive unified system provided with a specific independent formal institutional framework to administer the DSM. In addition, the dispute settlement processes now follow automatically with the elimination of the power of a contracting party or parties to block the process. Further is the introduction of the appellate review mechanism to ensure that decisions are based on correct legal interpretation. Remedies and enforcement mechanisms under the *DSU*, in comparison to that under the GATT, are now somehow propel by the system with the introduction of the surveillance mechanism.

On a comparative basis, therefore, the WTO *DSU* provides a stronger mechanism for dispute settlement and enforcement of rights and obligations assumed by Members of the WTO than did the mechanism provided under the *GATT*. And because the system under

the *DSU* minimizes the influence of power-related factors and seeks to ensure the rules agreed upon are respected, and that dispute settlements are based on legal principles, developing countries at least have the opportunity to ensure that violation of legal obligations by developed countries are addressed. Comparative analysis can, therefore, lead to only one conclusion: the system under the WTO provides a better framework and structure for dispute settlement than did the mechanism under the *GATT*.

A system of trading where rights and obligations are better protected and enforced naturally should be more attractive to participants, especially those of weaker status. Considering the power disparity between developing and developed countries, a rule-oriented system should be more attractive than a power-oriented system which best operates where the parties have equal bargaining power. Studies have disclosed increased participation by developing countries in dispute settlement process under the *DSU* over what was the case under the GATT.[102] The strengthening of the Dispute Settlement Mechanism under the WTO and its more rule-oriented and judicial focus are but two factors accounting for such increase.

These studies[103] in certain instances provide a misleading impression that the DSU is a perfect Dispute Settlement Mechanism. Far from that, the *DSU* contains a number of gaps or defects that prevent full recourse to the system especially by developing

[102] Kara Leitner & Simon Lester, "WTO Dispute Settlement 1995-2003: A Statistical Analysis" (2003) 7(1) Journal of International Economic Law 169. See also Pretty Elizabeth Kuruvila, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism" (1997) 31(1) Journal of World Trade 171.

[103] Ibid.

countries. Gaps exist in remedies and enforcement mechanism, in third party rights and intervention, in exclusion of private participation in dispute settlement process, in procedure defect and in others areas; and they must be addressed. The remainder of this thesis discusses these defects in the WTO DSM.

CHAPTER TWO

REMEDIES AND ENFORCEMENT MECHANISMS UNDER THE WTO DISPUTE SETTLEMENT MECHANISM

INTRODUCTION

The WTO agreements are comprised of rules for regulating international trade between Members. These rules confer rights and obligations on Members. These rules, like any other system of rules, will not provide effective discipline in international trade relations unless mechanisms are in place to enforce them.[104] Moreover, because the action or inaction of one or more Members may cause some economic injury to another Member, an effective remedy scheme to provide remedy for the injured Member is also essential to the functioning of the international trading system created under the WTO.

This chapter examines the remedies and enforcement mechanisms provided under the WTO DSM. It is argued here that the remedies and enforcement mechanisms provided under the WTO DSM are, from the perspective of developing countries, ineffective in three important ways. First, the provisions fail to ensure that developing countries effectively enforce their rights under the WTO Agreements and that developed countries perform their obligations under the WTO Agreements. Second, where there is breach of WTO Agreements, the enforcement mechanisms in place to ensure that recommendations are complied with are ineffective when the winning party is a developing country and the losing party is a developed country. Last, there is no remedy provided for past injury and in most cases for the continuous loss caused by failure to remove the inconsistent measure. This particularly discourages developing countries from having recourse to the DSM under the WTO.

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[104] Jeffrey S. Thomas & Michael A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Toronto: Carswell, 1997) at 308.

REMEDIES AND ENFORCEMENT MEASURES UNDER THE WTO

The importance of remedies and enforcement mechanisms under any legal system cannot be overstated. Indeed, respect for law depends upon them. Remedies and enforcement mechanisms are the cornerstone of any dispute settlement mechanism of any legal system, whether domestic or international. In a domestic setting, these two factors play a major role in an individual's decision to embark on any legal action. The situation is quite different in international relations where political and diplomatic considerations also play a major role.[105] That notwithstanding, the remedies and enforcement mechanisms under any international legal system are important factors for the credibility and effective operation of the system.[106]

There can be no right without remedy, and there can be no remedy where there is no enforcement mechanism.[107] The three elements are very much inter-related and must exist together for a legal order to function. The international trading system created under the WTO serves as a forum where Members make concessions in arriving at Multilateral Trade Agreements.[108] These in turn confer certain rights on Members to expect particular

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[105]Eric Reinhardt, "Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948-1998" (16 February 2000), online: <http://www.wtowatch.org/library/admin/uploadedfiles/Aggressive.Multilateralism_The_Determinants_pdf>

[106]Supra note 104.

[107]Ibid.

[108]Beatrice Chaytor, "Dispute Settlement under the GATT/WTO: The Experience of Developing Nations" in James Cameron & Karen Campbell, eds, *Dispute Resolution in the World Trade Organization* (London: Cameron May, 1998) 250 at 250.

standards of trade behavior from other Members. Members assume rights and obligations under the trading system. Where Members renege on their obligations under the system, they violate the rights of other Members.

The credibility of the system, therefore, depends on how it ensures that rights are respected and obligations enforced.[109] Where the rights of a Member are violated, effective remedy must be provided, and there must exist a set of mechanisms to enforce compliance. Generally, remedies are meant to serve two related purposes:[110] First, they are meant to remedy a situation, that is, they aim at addressing an illegality,[111] and second, they are meant to deter other potential violators from engaging in violation.[112] The dispute settlement mechanisms under the WTO provide some remedies for violation of obligations assumed under the WTO system and also certain enforcement measures to ensure that Members comply with their obligations.

Those remedies and enforcement measures are, as will be shown, ineffective in ensuring that developing countries enforce their rights and that developed countries comply with their obligations under the system. The remedies and enforcement mechanisms provided under the WTO Dispute Settlement System are products of GATT jurisprudence. The

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[109]Ibid.

[110]Henrik Horn & Petros Mavroidis, "Remedies in the WTO Dispute Settlement System and Developing Country Interests" (11 April 1999), 3. online:
<http://www1.worldbank.org/wbiep/trade/papers_2000/BPdisput.PDF>.

[111]Ibid.

[112]Ibid.

next section thus discusses the remedies and enforcement mechanism under the GATT regime; and the following section shows how these existing mechanisms have been codified under the WTO *DSU*. The third section then discusses how these are ineffective from the perspective of developing countries, drawing inferences from general international law.

Remedies and Enforcement Mechanisms under the GATT

The birth defect[113] of the *GATT* in 1947 resided in the area of remedies and enforcement measures available to a contracting party where there is breach by another contracting party of its GATT obligations. *GATT 1947* did not contain any specific provisions dealing with remedies in case of violation. According to Mavroidis, this was not an anomaly as "[i]t is often the case that drafters of a treaty leave it to the discretion of the adjudicating body to recommend the appropriate remedy."[114] This position seems doubtful, as *GATT 1947* did not provide for any adjudicating body for the settlement of disputes between contracting parties, except through consultation, bilaterally or multilaterally,[115] that is, in conjunction with the CONTRACTING PARTIES.

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[113]John J. Jackson, *The Jurisprudence of GATT and The WTO: Insight on Treaty Law and Economic Relations* (United Kingdom: Cambridge University Press, 2000) at 17-18.

[114]Petros Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place" (2000) 11(4) European Journal of International Law 763 at 774.

[115]Articles XXII and XXIII GATT 1947.

Remedies under the GATT regime were, however, developed through the various cases brought under the *GATT* and subject to panel investigation.[116] The GATT practice in respect of remedies was finally codified in the *1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.*[117] The *Understanding* provides that:

> [t]he aim of the CONTRACTING PARTIES has always been to secure a positive solution to the dispute. A solution mutually acceptable to the parties to a dispute is clearly preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.[118]

The only remedy available to a complaining contracting party where a measure was found to be in violation of any GATT obligation is a recommendation to the contracting party concerned to bring the measure in violation into conformity with the *General Agreement.*[119] The remedy of compensation, introduced later, was for situation where immediate withdrawal of the inconsistent measure was not practicable. In other words, cessation of the illegal act was the only remedy available under the GATT DSM. Such recommendation is general in nature with no specific mode of implementation. The

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[116]Robert H. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (United States: Butterworth Legal, 1993) at 29-31.

[117]GATT BISD, 26th Supp., (1979) 210.

[118]Ibid.

[119]Robert H. Hudec, "Broadening the Scope of Remedies in WTO Dispute Settlement" in Friedl Weiss, ed., *Improving WTO Dispute Settlement Procedures: Issues & Lessons From The Practice of Other International Courts & Tribunals* (London: Cameron May, 2000) 369 at 376.

contracting party concerned, therefore, had the discretion to decide, first, whether to comply with such recommendation and, second, on the mode of implementing the recommendation.[120]

Compensation was introduced as a partial implementation of developing countries' proposals for financial compensation in the case of wrongful actions by developed countries against developing countries.[121] Compensation, which was in the first place voluntary, was a temporary measure and limited to situations where immediate withdrawal of the illegal measure was not practicable.[122] It follows that a contracting party would only voluntarily agree to provide compensation where in the first place it was willing to withdraw the illegal measures and immediate withdrawal was impracticable. It is difficult to imagine that a contracting party would voluntarily agree to provide compensation indefinitely if it was unwilling to implement the recommendation.

The remedies available under the GATT DSM "had in practice a mere *ex nunc* (i.e., prospective) function."[123] The GATT contracting parties have always understood the

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[120]Ibid.

[121]*Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements* (1985) United States International Trade Commission (USITC) Report, at 22.

[122]Supra note 117.

[123]Henri Horn & Petros C. Mavroidis, "Remedies in the WTO Dispute Settlement System and Developing Countries Interests" (11 April 2000) online: The World Bank Group <http://www1.worldbank.org/wbiep/trade/paper_2000/Bpdisput.PDF>.

recommendation "to bring measures into compliance" as having a pure *ex nunc* effect.[124] The provision of compensation, where immediate withdrawal of the measure was impracticable, was to take care of future damage that may result from the continued existence of the infringing measure.[125] Horn and Mavroidis, however, argue that "the losing GATT contracting party could very well on its own initiative provide for a remedy with an *ex tunc* (i.e., retroactive) effect", but conclude that no such examples are reported.[126]

Before proceeding to the enforcement mechanism under the *GATT*, certain unusual developments in relation to remedies after the post-Tokyo Round are worth mentioning. GATT panels, in five cases dealing with antidumping/countervailing duties, departed from the usual remedy of recommending that the contracting party bring its measure into compliance with the *General Agreement*. In these cases, the Panels found the duties imposed to be illegal and recommended that the contracting parties revoke the order imposing the duties and reimburse the illegally imposed duties. The Panels thus departed from the standard *ex nunc* remedy.[127] Horn and Mavroidis claim that:

> [t]he argument could be made that these panels took a significant step towards real *restitutio in intergrum* in the GATT-context, since first they

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[124]Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (New Hampshire: Butterworth, 1993) at 30-31.

[125]Article 22.2 provides for the provision of compensation only where immediate withdrawal of the inconsistent measure is impracticable. See also Hudec, supra note 116 at 382-386.

[126]Supra note 123.

[127]Ernst-Ulrich Petersmann, "International Competition Rules for the GATT/WTO World Trade System" (1993) 27 Journal of World Trade 35 41.

> recommended revocation with retroactive effect of the illegal act (revocation of the order imposing the duties), and then the elimination of consequences stemming from the proclaimed illegal act (reimbursement of duties).[128]

This development was, however, limited to these five cases involving antidumping/countervailing duties.

The *GATT 1947* Article XXIII provides one mechanism to enforce compliance with recommendations. The Article provides that:

> . . .[i]f CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.[129]

The *1979 Understanding* reiterated this when it provided that:

> [t]he last resort which Article XXIII provides to the country invoking these procedures is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to the authorization by the CONTRACTING PARTIES of such measures.[130]

The threat of suspension of concession and the actual suspension of concession by the complaining contracting party was the only enforcement mechanism provided under the GATT DSM.[131] The effectiveness of such a mechanism basically rests on power-related factors in respect of the trade and economic damage that a retaliatory measure, taken by

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[128]Supra note 123 at 8.

[129]GATT Article XXIII:2.

[130]Supra note 119.

[131]Supra note 123 at 18.

the complaining contracting party, has on the contracting party in breach.[132] Developing countries are in that respect at a disadvantage in terms of compelling developed countries to comply with recommendations where they manage successfully to prosecute a claim against developed countries.

One complaint by developing countries against the dispute settlement mechanism under the *GATT* was that "it would not be possible to effectively retaliate against larger countries after a favorable determination of a complaint if the larger loser refused to abide with the terms of the outcome."[133] "The diversity of the developed countries' economies and large number of trading partners, contrasted with the narrower (in terms of types of products), and less stable economies of the developing countries, was emphasized as the basis of the lack of power to retaliate."[134]

Robert Hudec argues that one main factor accounting for this limitation in GATT law was the political commitment governments made to the GATT law. As put by Hudec:

> [t]he most obvious limitation, of course, was the fact that the entire legal drama took place in a setting in which the leading governments had retained the legal authority not to obey GATT law. GATT law was never given direct effect in their domestic laws. The fact that governments wanted the freedom to disobey was the starting point from which the GATT legal system had to build. No matter how well GATT legal system succeeded in constructing

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[132]Supra note 123 at 19-20.

[133]USITC Report, supra note 121 at 70.

[134]Kofi Oteng Kufour, "From the GATT to the WTO; The Developing Countries and the Reform to the Procedures for the Settlement of International Trade Disputes" (1997) 31 Journal of World Trade 117 at 120.

> impediments to the exercise of this freedom, the legal system was always working against this fundamental reservation.[135]

The whole dispute settlement system under the *GATT* was a rudimentary process, the emphasis was on diplomatic settlement of disputes rather than on an adjudicative system based on rules with legal consequences in case of breach. This, coupled with the absence of an independent formal institutional framework within which GATT operated, possibly accounts for the rather ineffective remedies and enforcement mechanisms provided for under the *GATT*.

Remedies and Enforcement Mechanisms under the DSU.

The *DSU* to a large extent codified the existing provisions that were under the GATT regime on remedies and enforcement mechanism.[136] Before proceeding to discuss these, it should be noted that there are basically two types of complaints that can be brought under the WTO dispute settlement system.[137] The first is the violation complaint,[138] and

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[135]Robert R. Hudec, "Broadening the Scope of Remedies in WTO Dispute Settlement" (2000), 1 at 3. online: WorldTradeLaw.net, *available at:* http://www.worldtradelaw.net/articles/hudecremedies.pdf.

[136]Article 3.1 of the *DSU* affirms the application of Articles XXII and XXIII of the *GATT* (the main dispute settlement provisions under *GATT*).

[137]A third complaint, referred to as situational complaint has fallen into *desuetude*. See Ernst-Ulrich Petersmann, "Violation and Non Violation Complaints in Public International Trade Law" (1991) 34 German Yearbook of International Law 175.

[138]Where there is allegation of infringement of any of the covered agreement. Article 3.8 states that in such a case there is a presumption of nullification or impairment of benefits and shifts the burden of proof onto the infringing Member to disprove such assertion.

the second is the non-violation complaint.[139] The non-violation complaint involves challenging a legal act and, because the act is not illegal, there is basically no remedy granted to the complaining party. Article 26.1(b), however, provides that:

> where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or Appellate Body shall recommend that the Member concerned make a mutual satisfactory adjustment.

The reason for this has been succinctly stated in the *Kodak/Fuji Dispute*,[140] where the Panel stated that:

> . . . both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated [non-violation complaints] as an exceptional instrument of dispute settlement . . . The reason for the caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.[141]

The focus here is, in consequence, on remedies against violation complaints.

The main remedies available under the WTO DSM are provided in Article 19 of the *DSU*. The provision states that:

> [w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.[142]

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[139]See Article XXIII GATT 1994 and Article 26.1 *DSU*.

[140]*Japan—Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998) WTO Doc. WT/DS44/R at para 31 (Panel Report).

[141]Ibid. at para. 10.36.

[142]Article 19.1.

This is in line with the first objective of dispute settlement under the *DSU*, that is, to secure the withdrawal of the illegal measure.[143] Like the *GATT* before it, the main remedy under the WTO is a recommendation to withdraw the measure adjudged to be illegal. Such recommendation by the panel or Appellate Body has no legal effect until adopted by the Dispute Settlement Body.[144] A specific time frame is, however, set under the *DSU* for the Member concerned to inform the DSB of its intention in respect of implementation of the recommendation;[145] and a recommendation is to be implemented within a reasonable period.[146] Article 21.1 provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all Members."

A recommendation to withdraw the illegal measure remains the main remedy under the WTO.[147] In addition, Article 19.1 introduces an innovation that "the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendation." This means that where the panel, or Appellate Body, makes the general recommendation that the Member concerned "brings the measure into conformity with that agreement," the Member is left with ample discretion to decide on how to

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[143]Article 3.7.

[144]Articles 16 & 17.4 *DSU*.

[145]Article 21.3 provides that such information be provided at a meeting held 30 days after adoption of the panel or Appellate Body report.

[146]Ibid.

[147]Article 19 *DSU*.

implement the recommendation. As the *Banana Cases*[148] demonstrate, such discretion can be subject to abuse. In that case, the Appellate Body Report condemned the EC bananas policy and requested the EC to bring their measures into compliance with their obligations. Certain changes were made, but the United States alleged that the implementing actions were inadequate and that the policy was still at odds with the EC's obligations under the WTO. At that stage, a new set of dispute is set in motion regarding the conformity of the implementing measures with WTO obligation. A circle that could possibly repeat itself with the respondent retaining the discretion to decide on the implementing measure.

The effect of such a general recommendation "to bring the measure into conformity with that agreement" in practice has an *ex nunc* (prospective) effect.[149] The remedy is to prevent future and continuing violation without taking into account the damage already done by the measure. The remedy, therefore, has the same effect as that under the *GATT*. Mavroidis argues that Article 19.1 on its face does not prejudge the time function of WTO remedies.[150] He supports this assertion with the panel finding in an arbitration between the United States and Australia concerning subsidies by the latter to exporters of automotive leather.[151] The measure was found to be illegal and the recommendation to

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[148]*European Communities—Regime for the Importation, Sale and Distribution of Bananas* (1996) (WT/DSB/M/16) WT/DS27.

[149]Supra note 123 at 13.

[150]Supra note 114 at 789-790.

[151]*Australia—Subsidies Provided to Producers and Exporters of Automotive Leather (Complaint by the United States)* (2000) WTO Doc. WT/DC126/RW (Panel Report).

Australia was to withdraw immediately the measure in accordance with Article 4(7) of the WTO *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*). The Panel rejected the argument of the United States that Article 19 of the *DSU* circumscribes the time function of WTO remedies. The relevant passage of the Report reads: "However, we do not believe that Article 19(1) of the *DSU*, even in conjunction with Article 3(7) of the *DSU*, requires the limitation of the specific remedy provided for in Article 4(7) of the *SCM Agreement* to purely prospective action."[152]

The standard approach of WTO panels in practice has been to limit their verdicts to recommendations. In all WTO cases, the losing Member is left with the discretion to decide on the best way to implement the recommendation. In that regard, one wonders how any recommendation can be implemented to have a retroactive effect. Where orders such as those imposing duties are found to be illegal under any WTO covered agreement and are revoked, it understandably has a retroactive effect; but where a panel does not go further than the general recommendation, the issue of reimbursement is at the discretion of the losing Member. The winning Member has no means of enforcing such reimbursement. The best bet will be to have recourse to the local remedies provided by the domestic courts of the losing Member. The Member in violation of its WTO obligation could possibly avoid any legal ramifications by repealing the order instead of revoking it.

[152]Ibid. at para. 6.31.

This leaves open the question of the legal effect of panel or Appellate Body suggestions on the ways in which the Member concerned could implement the recommendation, an innovation introduced to the usual remedy of recommendation adopted from the GATT practice. Since a general recommendation to bring a measure into compliance with the agreement gives the losing Member the discretion to decide how to implement the recommendation, giving the measure a prospective or retroactive effect, therefore, rests with that Member. Where future measures taken are in conformity with the covered agreement, the Member then is no longer in violation. The only means by which a Member can be bound to take measures that are retroactive is where suggestions are binding.

It has been suggested, based on a contextual argument, that suggestions made by panels under Article 19 in case of violation complaints can be interpreted as having a binding effect.[153] Article 26.1(c) of the *DSU* which deals with suggestions by a panel in cases of non-violation complaints states explicitly that ". . . such suggestions shall not be binding upon the parties to the dispute." No such qualification is added to the Article 19.1 suggestion in cases of violation complaint. "*A contrario;* therefore, one would be tempted to conclude that in the case of violation complaints, suggestions are binding upon parties."[154] The proper conclusion, however, is that suggestions are not binding on the Member in breach. Suggestion means just that, suggestion and nothing more, especially in international relations. This is so for two reasons. First, measures that limit state

[153]Supra note 123 at 14.

[154]Ibid.

sovereignty cannot be presumed. This is an established principle of customary international law.[155] Mavroidis argues that "at the end of the day, in cases of ambiguity, the judge will not draw far-reaching conclusions based on the silence of the text. Indeed, especially in international law, the transfer of sovereignty must never be presumed."[156] Second, Article 19.1 provides that "[i]n addition to its recommendations, the panel or Appellate Body **may** suggest ways in which the Member concerned **could** implement the recommendations."[157] The use of 'may' suggests that panels or the Appellate Body are not bound to make any such suggestion. And the use of the word 'could' implies that a suggestion, where made, is not binding upon the WTO Member concerned.

Whatever confusions that might have existed relating to suggestions by panel or Appellate Body have been clarified by the Panel in a dispute between Mexico and Guatemala.[158] The Panel, after quoting Article 19 of the *DSU*, reached the following conclusion:

> Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member. Thus, in a dispute where a panel concludes that a Member has violated the provisions of the ADP Agreement [Agreement on Antidumping], it is constrained by the language of Article 19(1) to recommend that the Member brings its actions, or its measure, as the case may be, into conformity with the provisions of the ADP Agreement. In addition the panel could, at most, suggest ways in which it believes the Member could appropriately implement that recommendation. In the first instance, however, the modalities of implementation of a panel or

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[155] *SS Lotus (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10, 95.

[156] Supra note 114 at 784.

[157] Emphasis added.

[158] *Guatemala—Antidumping Investigation Regarding Portland Cement from Mexico* (1998) WT/DS60/R.

> Appellate Body recommendation are for the Member concerned to determine. This is confirmed by the language of Article 21(3) of the DSU.[159]

The point here is that the remedy provided under the *DSU*, a recommendation to bring the measure concerned into conformity with the relevant agreement, leaves the Member in violation with the discretion to decide on the method to implement the recommendation. Generally, the practice has been to adjust or withdraw the future application of the measure, which clearly gives the remedy an *ex nunc* effect. Moreover, since suggestions by the panel are not binding, any suggestion implying an *ex tunc* effect can be disregarded by the Member concerned. As it stands, therefore, the remedy under the *DSU* has a purely *ex nunc* effect, unless the Member in violation decides to give it an *ex tunc* effect. The situation has not yet arisen where a Member challenges an implementation measure on the ground that it did not take a retroactive effect.

This is not to suggest that Article 19.1 suggestions have no legal significance. Suggestions provide clear guidance as to which measures would satisfactorily be regarded as an implementation of panel recommendation to bring the measure into compliance with the agreement. As Mavroidis argues:

> . . . panels' suggestions are [. . .] not devoid of legal consequences: were the concerned to follow the panel's suggestions, its actions would have to be deemed to have brought its measures into compliance with its obligations under the WTO. In other words, a suggestion by a panel creates an irrefutable presumption of legality for any subsequent action aimed at implementing the suggestion within its ambit.[160]

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[159]Ibid. at para. 8.2-8.3.

[160]Supra note 114 at 786.

Consequently, where a Member in violation follows a panel suggestion in implementing a recommendation, there is a presumption of compliance. The Member denying compliance therefore assumes the burden of proving, not only that the implemented suggestion still runs contrary to the covered agreement but also that the suggestion itself is inconsistent with the covered agreement.

Where there is a violation of obligations assumed under the WTO, the resultant economic loss is greater on developing countries than on developed countries. Developed countries are more able to mitigate a resultant loss due to their economic diversity and market access. The failure of the *DSU* to remedy that loss is a likely factor in discouraging developing countries from having recourse to the system under it. In addition, the forward-looking remedy provides impunity for countries to adopt measures violating *WTO Agreement* on a hit-and-run basis. A country may take violation measures that provide certain immediate economic benefits to it. The dispute settlement procedure may take as long as three years for the DSB to grant authorization for retaliatory measures. In the interim, the country in violation continues to derive benefits from the illegal measures to the detriment of another country. In the long run, the violation country can escape retaliatory measures just by bringing the measure into conformity with the agreement without providing any compensation for the losses the measures have caused.

An auxiliary remedy is provided for under Article 22 of the *DSU*. Following the *1979 Understanding*, this provision provides for the negotiation of compensation between the disputing parties where it is impractical to comply with the recommendation or ruling

within a reasonable time. Compensation is, therefore, a temporary measure pending the full implementation of recommendations. Such compensation is voluntary and, if granted, should be consistent with the covered agreements.[161] However, the compensation, like the remedy of recommendation, is forward-looking, i.e., it is meant to take care of future damage that may be caused by the continuation of the violation measure after the expiration of a reasonable period for the implementation of the recommendation.[162] Some, however, have argued that nothing stops the defendant country from providing compensation for past damages.[163] This situation is, however, highly unlikely and there have been no such case where compensation has been provided for past damage.

Under the GATT regime, developing countries argued that forward-looking remedies were not enough to address harm already caused by a violation, and that illegal trade restrictions caused serious harms to the already fragile economies of developing countries.[164] They therefore submitted that developing countries should be entitled to retroactive damages in the form of financial awards where the violator is a developed country.[165] This proposal was not adopted under the GATT regime, nor does the *DSU* provide such remedy.

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[161]Article 22.1 of the *DSU*.

[162]Ibid.

[163]Supra note 114 at 790. See also Hudec, supra 119.

[164]Supra note 134 at 120.

[165]USITC Report, supra note 121 at 22.

As noted earlier, the provision of compensation is a temporary measure pending full implementation of the panel or Appellate Body recommendation.[166] It follows that where a Member negotiates and provides compensation to the winning party, the Member continues to be in violation of its obligations under the WTO. The purpose of compensation is to forestall the taking of retaliatory measures by the winning party after the lapse of a reasonable period for implementation. It further follows from the wording of the provision that a Member is likely to provide for compensation, first, if it is willing to bring its measure into conformity with the agreement but immediate implementation is not practicable and, second, where potential retaliatory measures could have serious economic, political or social effects. It is difficult for one to imagine a situation where a Member unwilling to implement panel recommendation would negotiate for the provision of an indefinite compensation to a winning party. The second qualification particularly puts developing countries, the Members who need compensation most, at a disadvantage for their retaliatory measures are less likely to have an impact on developed country violators.

The only enforcement mechanism provided for under the *DSU*, as under *GATT*, where a Member in violation fails to implement a recommendation is the authorization granted, at the request of the complaining Member, to suspend concessions and other obligations to the Member concerned.[167] The improvement to the process by the *DSU* is that authorization to retaliate is now automatic at the request of the complaining Member,

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[166]Article 22.1.

[167]Article 22.2.

unless the DSB decides by consensus not to grant the authorization.[168] The Member in breach has no power to block the others' rights to take retaliatory measures as was the practice under the *GATT*. Such power can only be collectively exercised by the DSB.[169]

The legal theory of GATT/WTO retaliation rests on the concept of reciprocity.[170] The legal obligations of the WTO, both the entire multilateral trade agreements and specific network of tariff bindings, are constructed on the idea that each government's obligations are given in exchange for the obligations of the other parties to the agreement.[171] Therefore, where one party reneges on fulfilling its obligation to another Member, that Member should be free to do the same. This provides a sort of balancing act between Members of the WTO. This analysis may hold true in case of a bilateral agreement, but is wholly inaccurate in relation to multilateral trade agreements. Multilateral Trade Agreements under the WTO provide for fair and indiscriminate treatment of all country Members in international trade relations. It is not a give-and-take situation. Country A may be a major exporter of goods and services to County B without any corresponding export or other trade flow form Country B, either in the sense of total absence of or of no corresponding value of goods or services to Country B. Countries dependent on international trade are more likely to be hurt by a violation than those who are not.

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[168]Article 22.6.

[169]Ibid.

[170]Supra note 135 at 21.

[171]Supra note 134 at 20-23.

Even in cases of corresponding trading activities between two countries, taking retaliatory measures does not necessarily produce the effect of balancing-off the damage that might be caused by the violation. Hudec notes that in "economic terms, the balancing rationale for retaliation is a fiction. The aggrieved country does not really gain anything by raising trade barriers. The act usually inflicts a net loss upon its own citizens, even though most of its citizens are not aware of that fact."[172] As put by another writer, "[i]t is a common place in economics that countermeasures amount to 'shooting oneself in the foot'."[173]

Granting the truth of the retaliatory-based theory of the concept of reciprocity, retaliation as a measure of forcing a reluctant party to comply with a recommendation can only be an effective enforcement mechanism where the trading relation and economic effect between the two parties is of equal or proportional character, a situation notably lacking in terms of trading relations between developing and developed countries. The argument against the GATT enforcement mechanism—namely, that developing countries would not be able to retaliate effectively against larger countries after a favorable determination of a complaint if the larger loser refused to abide with the terms of the outcome—still holds under the WTO. "The diversity of the developed countries' economies and large number of trading partners, contrasted with the narrower (in terms of products and

[172]Supra note 135 at 22.

[173]Supra note 114 at 807.

number of trading partners) and less stable economies of the developing countries, was emphasized as the basis of this lack of power to retaliate."[174]

Horn and Mavroidis provide a good example of this situation: as a result of a conflict between the European Community and the Ivory Coast, the EC is authorized to take retaliatory measures. Consequently, it imposes a premium on the exports of coffee from the Ivory Coast which practically excludes Ivory Coast from the EC market. Imagine, however, that the result was the other way around and that the Ivory Coast was authorized to take retaliatory measures and imposes a premium against exports of cars from the EC practically making it impossible for EC cars to penetrate the Ivory Coast market. Surely the two measures are not equally effective means to deter a violation or ensure compliance.[175]

Again, the *Bananas Case* illustrates how the use of retaliation to ensure compliance is not a viable option for developing countries. All the co-complainants in the bananas dispute were developing countries, but not one of them opted for retaliation like the United States. Retaliation thus remains an instrument in the multilateral trading system that is more likely to be used against developing countries than be used by them.

The *DSU* not only lacks an effective enforcement mechanism from the perspective of developing countries, but also provides a number of qualifications for the protection of

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[174]Supra note 134 at 120.

[175]Supra note 123 at 26.

the recalcitrant defendant. These include third-party review of the amount of retaliation, the appropriateness of the economic sector retaliated against, and the question of non-compliance itself if disputed.[176] These qualifications can be used by a party to delay and even frustrate the other party's right to retaliate.

Article 21.5 provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including where possible resort to the original panel." Since recommendations leave the defendant party with the discretion to decide on the appropriate means of implementation, the party can do 'something' not wholly bringing the measure into conformity with the agreement. The complaining party cannot request for authorization to suspend concession, as it is not the same dispute anymore. The complaining party then has to request for an Article 21.5 panel to determine whether the measure taken fully complies with the recommendation. The request to take a retaliatory measure can only then be granted where the measure was found not to comply with the recommendation.

The second qualification to the right to take retaliatory measures is provided for in Article 22.4 of the *DSU*. The provision states that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment." Paragraph 7 provides for the appointment of an arbitrator to determine whether such suspension is equivalent to the level of nullification or impairment. It

[176]Supra note 135 at 20.

follows that the party requesting authorization to suspend concession must indicate the level of suspension, and if the party in breach disputes that, then the matter must be subjected to arbitration before the DSB can grant authorization for such suspension. This is meant to ensure the equivalence between the retaliatory measure and the damaging effect. The *DSU*, however, does not address the situations where the measures available to the party taking the retaliatory measures are less than the infringing measures, as is the case between most developing countries and the developed ones.

The issue of equivalence also cuts into the issue of measuring the retaliatory action. The *DSU* provides that the level of the retaliatory measure must be "equivalent to the level of nullification or impairment."[177] The *GATT 1947* provides that the CONTRACTING PARTIES may authorize the suspension of concession under any of the covered agreements "as they determine to be appropriate in the circumstances."[178] The purpose of retaliatory measures is to ensure that a Member complies with a panel recommendation. In that case, the *GATT 1947* provision provides a better framework, as retaliatory measures can be taken to the extent possible to induce compliance.[179] The *DSU* provision strictly limits such measures to the level of damage caused by the violation measures. It has therefore been argued that "Article 22(4) is a setback in comparison to Article

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[177] Article 22.4 of *DSU*.

[178] Article XXIII.2 of *GATT 1947*.

[179] The only reported case under the *GATT* where recourse to retaliatory measures was envisaged. *Netherlands—Measures of Suspension of Obligations to the United States*, BISD 1S 28. A related request for retaliatory measure was also made in the case of Superfund, *United States—Taxes on Petroleum and Certain Imported Substances*, BISD 34S/160.

XXIII(2) *GATT* when it comes to measuring the permissible extent of countermeasures, since it imposes a strict equivalence between damage incurred and level of countermeasure."[180]

Apart from determining that the level of suspension of concession is equivalent to the level of nullification or impairment of benefit, Article 22.3 imposes an obligation on the Member requesting such authorization to "first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment."[181] Where that is not practicable or effective, the party may suspend concession in other sector(s) under the same agreement.[182] Where it is further not practicable or effective to suspend concessions under the same agreement, the party may seek to suspend concessions or obligations under another covered agreement.[183] This is to ensure that the retaliatory measures are not only equivalent, but also similar to the violation measure.

Retaliatory measures or countermeasures are the *ultima ratio* of the WTO system.[184] Members are forced to bring their inconsistent measures into conformity with the covered agreements through the threat of or actual suspension of concession. However, suspension of concession from the developing countries' perspective is not credible. The

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[180]Supra note 114 at 801.

[181]Article 22.3(a).

[182]Ibid. para. (b).

[183]Ibid. para. (c).

[184]Supra note 123 at 18.

fact that a retaliatory measure is limited to the level of nullification or impairment means that anytime the gains accruing to a Member in violation is greater than the damage that can be caused by retaliatory measures, there is less incentive to comply with a recommendation. And, as noted earlier, the effectiveness of a countermeasure also depends on the economic importance of the country adopting it. There are generally unequal trading activities between developing and developed countries in terms of the attraction of a particular market to exporters.[185]

One other related defect in the enforcement mechanism of countermeasures under the *DSU* is the member-to-member countermeasure. Countermeasures can only be taken by the party who invokes the dispute settlement mechanism under the *DSU*.[186] There are no collective remedies or sanctions by the WTO membership as a whole. Ensuring compliance thus depends on the power available to a particular country against the other. And as Pauwelyn notes:

> [f]or members disputing a case at arm's length-in practice, mostly the developed members—the resurgence of economic and political power as factors in achieving compliance may be manageable. In those instances countermeasures may, indeed, gradually induce compliance. In the contrasting case where a weaker member is faced with noncompliance by a disproportionately stronger member, the reactivation of power politics—which are at play in negotiations on compensation and possible imposition of countermeasures—may make compliance hard to achieve. Even if compliance, eventually occurs, the interested sectors of the weaker member may already have been forced out of business.[187]

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[185]Supra note 134 at 120.

[186]Article 22.2.

[187]Pauwelyn Joost, "Enforcement and Countermeasures in the WTO: Rules are Rules- Toward a More Collective Approach" (2000) 94 American Journal of International Law 335 at 339.

Thus the unilateral enforcement mechanism is particularly unfavorable to developing countries, especially against a developed country. In addition, the use of an enforcement mechanism effectively moves the dispute from the domain of the DSB into the arena of international politics with its power-related factor, an arena where developing countries are particularly disadvantaged. A system of enforcement by the organization on behalf of a member does not exist under the WTO. In comparison, a better enforcement mechanism exists under the European Community, where enforcement is by the Commission on behalf of the individual participant, and ensures better compliance with a recommendation. The WTO provides a system where a Member has to bear the total cost of initiating and prosecuting a claim under the dispute settlement mechanism, and then has to incur further cost to ensure that the recommendations are implemented.[188]

The suspension of concessions or other obligations to the Member in violation by the complaining Member is meant to induce compliance. It follows, as provided in Article 22.1, that such measure is only a temporary measure pending the full implementation of the recommendation of bringing the measure into conformity with the agreement. The Member in violation thus continues to be in breach of the WTO Agreement with no further means of enforcing compliance; and in a sense, the Member taking the retaliatory measures is also in violation as retaliatory measures involve raising trade barriers against a particular Member. The present system thus allows such measures to continue indefinitely. A Member can adopt violation measures so far as it can comfortably live with the countermeasures, a situation clearly disadvantageous to developing countries.

[188]Supra note 135 at 34.

Remedies and Enforcement Mechanisms Under International Law

WTO obligations are part of international obligations under the whole sphere of international law. Hence, its remedies and enforcement measures should at least attain the standard recognized under international law. General state responsibility under international law has been codified under the *International Law Commission (ILC) Draft Articles on State Responsibility of 1996* (hereinafter, the *Draft*).[189] These Articles codify existing customary international law principles governing the relationship between states. However, Article 37 of the *Draft* provides that the provisions do not apply "where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act." To that extent, the provisions do not apply to WTO obligations. However, it is worth noting how, in comparison, the WTO fails to provide effective remedy, in line with principles of international law, particularly from the perspective of developing countries, for breach of WTO obligations, which are in all senses international obligations.

The *ILC Draft Articles* in Articles 41 and 42 declare remedies a state must provide for breach of its obligations under international law. According to the provisions, a state which is the author of an illegal act has, first, the obligation to cease the illegal act[190] and, second, the obligation to provide a form of reparation to the injured party.[191] The WTO fulfils the first obligation by providing that where a panel or Appellate Body concludes

[189]UN GA Doc. A/CN.4/L.528/Add.2 (16 July 1996).

[190]Article 41.

[191]Article 42.

that a measure is inconsistent with any of the covered agreements, it shall recommend to the Member concerned to bring the measure into conformity with the agreement.[192] In other words, the Member should cease the illegal act. The problem here, however, is that the measure provided to ensure cessation does not allow developing countries effectively to ensure that developed countries comply. In addition, the general nature of such recommendation leaves the Member concerned with the discretion to adopt any mode of implementation which may not wholly bring to an end the illegal act. Developing countries, due to their weak economic position, are not able to enforce the adoption of a particular or specific mode of implementation that effectively ends the illegal act.

The second provision provides for the right of the injured party to request reparation in addition to the obligation to stop the illegal act, a stipulation clearly lacking under the WTO *Understanding*. Whereas the argument under international law has developed to the extent of deciding which mode of reparation (whether restitution or compensation)[193] should be adopted, the *DSU* does not provide for any right of the victim to request compensation. The element of compensation provided under Article 22 is a voluntary measure for the parties to the dispute to negotiate where it is impractical immediately to bring the measure into conformity with the agreement. The wording of the provision also means that such compensation is a temporary measure to prevent future damage that the

[192] Article 19.1 of *DSU*.

[193] *Chorzow Factory Case (Indemnity) (Merits) Germany v. Poland* (1928) P.C.I.J. Reports, Series A, No. 17.

complaining party may suffer due to the continued existence of the infringing measure, but it excludes any possibility of damages for past damage.

It may be true, as argued by some commentators, that the WTO *Understanding* provides an international dispute settlement mechanism that should serve as a model for reforming the general international legal order.[194] The institutional framework of the *DSU*, the specific time frame set to prevent delays, the compulsion in the system in terms of the automatic establishment and adoption of panel reports, and the introduction of appellate review, lend credence to this assertion. However, the *Understanding* clearly lacks effective remedy and enforcement mechanisms when assessed against the principles of international law.

Suggestions for the Renegotiation of Remedies and Enforcement Mechanisms under the WTO Dispute Settlement Mechanism.

Based on the above discussion, some suggestions are put forward for the renegotiation of remedies and enforcement mechanisms under the WTO DSM to provide a more judicial focus to the DSM. Drafting provisions of international agreements, like WTO agreements, is based on significant compromise and negotiation with respect to the use of language. The purpose of this section is not to provide draft provisions that should be

[194]Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" in Ernst-Ulrich Petersmann, Ed., *International Trade Law and the GATT/WTO Dispute Settlement System*, Vol. II (London: Kluwer Law Int'l, 1997) 1 at 25.

included in the DSU, but to provide general suggestions that should be reflected in the negotiated provisions.

As a first measure, the Article 19 panel or Appellate Body suggestion should not just be a suggestion, but a binding recommendation subject to adoption by the DSB. Suggestion should be placed on par with the present recommendation under Article 19.1 of the *DSU*. In that regard, the complaining party should have the right to request for specific measures for the implementation of panel or Appellate Body recommendation. The determination on such request should form part of the term of reference of the panel. This would avoid the present vague recommendation that leaves the Member in violation the discretion to decide the mode of implementation. Undermining state sovereignty and government authority are possible downsides to giving panel or Appellate Body the power to authorize specific implementing measures. However, such effects will be minimized by the fact that panel or Appellate Body reports are subject to adoption by the DSB.

Second, there is also the need to provide for the right of the complaining party to request compensation for past damages and, where the measure cannot be immediately brought into conformity with the agreement, damages for continuous losses. This is because the loss suffered during the period of taking the measure in violation and the actual resolution of the dispute can be substantial and can be particularly damaging for smaller developing countries which are highly dependent on a limited number of export products/markets. Such compensation should not be voluntary as is the current practice. Members should

however be free to negotiate mutually satisfactory compensation consistent with their WTO obligations. Where the parties cannot arrive at any such mutually satisfactory agreement, the procedure can be subject to panel arbitration, and the panel award should be binding. Compensation should take into account the cost incurred by the winning party in the dispute settlement process. Compensation should therefore be compulsory and automatic, in the same way that countermeasures currently are.

The bilateral enforcement mechanism provided under the *DSU* depends heavily on power-related factors available at the disposal of the Member. This has serious practical limitations as developing countries find it extremely difficult to take any retaliatory action against a developed country. This is due not only to political considerations but also to the unequal economic relationship in which developing countries are generally more dependent on the continued relationship with developed countries for their economic growth and development. In addition, taking retaliatory measures is also costly to the country taking the measure, developing countries would tend to suffer double agony by taking retaliatory measures. This effectively leaves developing countries without any means of enforcing compliance.

There should, therefore, be a mechanism for enforcing compliance on behalf of individual countries by the WTO. The surveillance procedure under the *DSU* for monitoring the implementation of recommendation[195] is a right step. However, where a Member fails to implement a recommendation within the specific time provided, a

[195] Article 21.6 of *DSU*.

collective enforcement procedure should be set in motion. A violation of any covered agreement is a violation of a multilateral agreement, and must, therefore, invoke a multilateral or collective response to ensure that all Members respect the obligations assumed under the agreement. This should be in line with the Appellate Body Report in the *EC- Banana Case* on the issue of standing to bring a complaint, where the Appellate Body quoted with approval the following remark of the Panel Report: "with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing WTO rules than in the past since any deviation form the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."[196]

Remedies and enforcement mechanisms of these sorts would be more in line with the rule-oriented, legal and judicial nature of the dispute settlement system under the *DSU*. Notwithstanding that state sovereignty may be at issue, the conduct of multilateral trade under the auspices of agreed WTO rules would be undermined if rules negotiated are not respected and are not enforced. However, as Pauwelyn notes:

> the political reality today indicated that acceptance of many of these suggestions to strengthen the WTO enforcement mechanism and the remedies it provides . . . is far away. It would therefore be wrong to take these important steps precipitously and without extensive discussion; doing so could threaten the political support and legitimacy of the WTO, in general, and of its dispute settlement decisions, in particular.[197]

Hudec, however, suggests a very skeptical future for such change. He argues that:

> [g]iven the somewhat qualified level of political commitment to the new WTO legal system [. . .], the limitations of present WTO remedies should not

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[196] *EC— Member States Import Regimes for Bananas* (1996) WTO Doc. WT/DS27/AB/R, para. 136.

[197] Supra note 186 at 347.

> come as a surprise to anyone. Nor should it be a surprise that the chances for broadening these remedies are not very good. Indeed, if the likely outcome of the current imbroglio over Articles 21.5 and 22.6 is any guide, the most likely direction of change in the near future will be toward relaxation of the rigor that exists today.[198]

The future of the WTO and effective participation, especially by developing countries, depends on an effective mechanism for enforcing rights and obligations. A reform in this area should therefore be more of a necessity than a political game. In the ongoing review process under the DSB, developing countries, including Venezuela; India; Pakistan; Argentina; Costa Rica; Guatemala; Singapore, Thailand and Hong Kong, have presented proposals in these areas for improvements. The acceptance of these proposals will maintain the balance of rights and obligations negotiated during the Uruguay Round.

[198] Supra note 135 at 34.

CONCLUSION

The World Trade Organization provides a very good prospect for developing countries to participate effectively in international trade. International trade cooperation, based on Multilateral Trade Agreements negotiated by all member countries during Multilateral Trade Negotiations, and administered under the auspices of the WTO, provides a more favorable platform for developing countries than would a system based on power-related factors. In addition, trade liberalization, through the elimination of tariff barriers and non-tariff barriers, provides better platform for the conduct of international trade relation among states. Centralizing that process through a rule-based system is a major positive development.

Member countries of the WTO assume obligations and rights through the trade agreements negotiated under the WTO. Such negotiations involve making concessions, economic or political, in the expectation that future benefits will offset the sacrifices. Rights and obligations must be respected and enforced. A DSM through which rights and obligations are enforced is, therefore, central to the WTO. The WTO *DSU* is a central factor for the credibility of the system and consequently to participation.

Participation by developing countries in the WTO's trading system opens up their economies and places their development process in a vulnerable position, particularly considering their economic dependence on developed countries. This is recognized in the Preamble to the *WTO Agreement*. They therefore stand to lose more, if rights and

obligations are not taken seriously. The *DSU* mechanism, providing for enforcing rights and obligations, is vital for their effective participation.

However, the remedy and enforcement mechanism provided under the *DSU* detract from the rule-oriented, legal and judicial focus of dispute settlement under the *DSU*. The only remedy provided under the WTO, a general vague recommendation with no specific mode of implementation, is forward-looking without any compensation for past damage. Compensation for future damage, where the measure cannot be immediately withdrawn, is voluntary. This is particularly damaging for smaller developing countries which are highly dependent on a limited number of export products and markets. The associated costs with the dispute settlement and enforcement procedures are borne by only the complaining party. The only enforcement mechanism provided is based on power-related factors.

Political and economic powers are key players in the implementation process and in forcing compliance on a reluctant party. Developing countries, as weaker partners, are at a double disadvantage. If a developing country balks at a panel or Appellate Body ruling in favour of a developed county complainant, it has to face sanctions and pressures by a more powerful country. If, on the other hand, the latter balks at a judgment in favour of a developing country complainant, that developing country is hardly in a position to mobilize and exert the necessary pressure to force compliance or to retaliate.

Review of remedies and enforcement mechanisms under the *DSU* is an important condition to ensure that developing countries are able to take greater advantage of the DSM under the WTO. Developing countries have already put forward proposals for reform, and discussion of these proposals is already underway in the DSB. The outcome of these proposals depends on how developing countries are able to defend and advance these and other follow up proposals forcefully and collectively.

CHAPTER THREE

THIRD PARTY RIGHTS/INTERVENTION AND PRIVATE PARTIES' PARTICIPATION IN WTO DISPUTE SETTLEMENT

INTRODUCTION

The WTO provides for a multilateral trading system where Members make concessions based on multilateral trade agreements.[199] Unlike bilateral trading arrangements, the multilateral trading arrangement operates on a balancing scale, based not on a reciprocal arrangement between two Members, but rather on an interrelated balance between all Members.

Within that framework of an interdependent balance among WTO Members are private parties who are the economic actors within the international trading system. The term private parties as used here includes all natural and artificial persons—business corporations, partnerships, cooperatives, etc—engaged in any international economic activity that is regulated under the WTO rules. For the purposes of this discussion, non-governmental organizations (NGOs) are excluded from that definition because they fall within a distinct category of civil society, promoting other narrow interests than the use of the WTO DSM by developing countries.

Given the interdependent balance among all WTO Members, violation of a WTO obligation by one Member, not only affects the Member whose benefits are directly nullified or impaired, but also offsets the balance among other WTO Members. For example, the most favoured nation principle requires equal treatment of all WTO

[199]Beatrice Chayton, "Dispute Settlement Under the GATT/WTO: The Experience of Developing Nations" in James Cameron & Karen Campbell, eds., *Dispute Resolution in the World Trade Organization* (London: Cameron May, 1998) 250 at 250.

Members. A breach of that principle not only nullifies benefits to one country but also creates discriminatory treatment in the multilateral trading system. Further, the interests of private parties operating under the WTO rules are affected directly by a violation of WTO obligation. For example, prohibition of import of woven wool shirts and blouses from India not only affect the state of India but also directly affect private businesses engaged in the production of woven shirts and blouses.

Third party intervention in WTO dispute settlement proceedings provides an effective means of addressing the multilateral nature of WTO disputes. However, as it is argued here, the procedural rights guaranteed to third parties under the WTO *DSU* hinders effective participation by third parties. Further, lack of any substantial rights for third parties to enforce recommendations makes their participation ineffective. It is further argued that excluding private parties from WTO dispute settlement subjects the system to political subversion which detracts from the legal and judicial nature of the WTO DSM.

Developing countries are able to participate in the WTO dispute settlement process more as third parties than as actual parties to the dispute; and developing countries are more at the receiving end of the fusion of the dispute settlement system with political manoeuvres. Strengthening the dispute settlement process to provide a level playing field for developing and developed countries calls for taking a closer look at third party rights/intervention and participation by private parties. The next section looks at third party rights and intervention, and the section following addresses private party participation in the dispute settlement process.

THIRD PARTY RIGHTS/INTERVENTION AND DEVELOPING COUNTRIES

The effectiveness of the WTO DSM is measured by the degree to which it is able effectively to ensure that rights and obligations assumed under the various *WTO Agreements* are respected. As noted earlier, the DSM under the WTO is more rule-oriented and takes more of a judicial focus to trade dispute settlement than did the power-oriented and diplomatic focus emphasized under the *GATT*.[200] Members now initiate dispute settlements to vindicate their legal rights rather than to set in motion diplomatic negotiation for trade concessions.[201]

This section examines the extent of third party rights under the WTO dispute settlement. The examination of third party rights here is not limited to procedural rights conferred on third parties under the *DSU*, but includes substantive third party rights that enable third parties to ensure that the actions or inactions of other Members that are subjected to the dispute settlement process effectively address their interests.

Third parties have been granted certain procedural rights under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*. The use of such procedural rights by third parties intervening in WTO dispute settlement process over the years has produced inconsistent results leading to some suggestions for reforming third

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[200]See John H. Jackson, *The Jurisprudence of GATT and The WTO: Insight on Treaty Law and Economic Relations* (United Kingdom: Cambridge University Press, 2000) at 178.

[201]Mitsuo Matsushita, Thomas J. Schoenbaum & Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (New York: Oxford University Press, 2003) at 20.

party rights in the WTO DSM.[202] This chapter examines the development of third party procedural rights over the years through the various cases resolved under the GATT DSM to WTO disputes. In addition, the substantive rights, if any, of third parties intervening in disputes will be explored.

The cost, resources and implications involved in initiating and maintaining dispute settlement as a party under the GATT/WTO DSM may, in some respects, hinder the use of the process by developing countries.[203] The alternative of joining an ongoing dispute settlement process dealing with a subject of interest to developing country members as third parties is an attractive alternative. Records show that most, if not all, dispute settlement initiatives undertaken by least developed countries and sub-Saharan African states under the GATT/WTO DSM have been as third parties.[204] This makes the substantive and procedural rights associated with third party intervention of particular interest to the discussion on developing countries' perspectives on WTO DSM.

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[202]Nick Covelli, "Third Party Intervention Jurisprudence" (2003) 37(3) Journal of World Trade 673 at 680.

[203]Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Papers, "Issues Regarding The Review of The WTO Dispute Settlement Mechanism" (South Centre, February 1999), online: <http://www.southcentre.org/publications/trade/dispute.pdf>.

[204]List of WTO disputes can be found online: <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes>; see also Pierre Pescatore, *WTO/GATT Dispute Settlement Digest* (New York: Transnational, 1997).

Third Party Intervention Jurisprudence

As noted earlier, the 'birth defect'[205] of *GATT 1947* did not allow for elaborate provisions dealing with dispute settlement. Articles XXII and XXIII, the main dispute settlement provisions under *GATT 1947*, did not contain any provision dealing with third party interventions or rights in the dispute settlement process. Third party intervention or rights, however, developed through GATT dispute settlement as the process assumed its legal focus with the development of panel proceedings, and was codified in later developments.[206]

It has been noted that the first third party intervention under the GATT DSM arose not through a request from one or more third contracting parties, but instead at the instigation of the GATT Council.[207] In 1973, the United States initiated a complaint against the United Kingdom in the *United Kingdom— Dollar Area Quotas*[208] for maintaining quantitative restrictions for balance of payments purposes on a number of citrus and other tropical products, originating from "Dollar Area" countries.[209] At the meeting for

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[205]Supra note 200 at 18.

[206]Mary E. Footer, "Some Aspect of Third Party Intervention in GATT/WTO Dispute Settlement Proceedings" in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System*, Vol. II (London: Kluwer Law Int'l, 1997) 213 at 216.

[207]Ibid.

[208]*United Kingdom- Dollar Area Quotas (Complaint by the United States)* (1973) L/2842 and L/3891, BISD 20S/230.

[209]Namely: Bolivia, Canada, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Republic of Honduras, Liberia, Mexico, Nicaragua, Panama, Philippines, United States and Venezuela.

establishing a panel, the Chairman of the Council stated that "the panel would certainly wish to hear from the representatives of Jamaica, Trinidad and Tobago, and Cuba on this matter" as interested third parties.[210] The interim and final Report of the Panel indicate that the Panel took into consideration the interests of all third parties to the dispute.

It should also be noted that one of the complaints levelled against the GATT DSM by developing countries was that bilateral settlement of disputes amounted to deviation from legalism as the philosophy underpinning the process of dispute settlement.[211] Lack of third party intervention in the dispute settlement process under the *GATT* was seen as encouraging situations where matters under the general domain of the *GATT* were settled bilaterally, rather than through the GATT multilateral mechanism.[212] Mexico, Jamaica, Hong Kong, Singapore and other countries, during the Uruguay Round negotiations, argued for provisions to guarantee third party rights in the dispute settlement process.[213]

The first codification of an emerging trend in third party intervention or right in the dispute settlement process, however, came during the Tokyo Round negotiation. This was reflected in the *1979 Understanding Regarding Notification, Consultation, Dispute*

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[210]Supra note 206 at 217.

[211]Terence P. Stewart, ed., *The GATT Uruguay Round: A Legislative History*, Vol. II (Deventer: Kluwer Law & Taxation, 1993) 2676 at 2737.

[212]Kofi Oteng Kufour, "From the GATT to the WTO- The Developing Countries and Reform of the Procedures for the Settlement of International Trade Disputes" (1997) 31(5) Journal of World Trade 117 at 137.

[213]Ibid. at 137-138.

Settlement and Surveillance that included an *Annex on Agreed Description of Customary Practices of the GATT in the Field of Dispute Settlement.*[214] Under paragraph 15, the GATT Secretariat adopted a procedure under which a party having substantial interest in a matter under consultation could join the consultations, if the contracting party to whom the request was directed agreed that the third party had substantial interest in the matter. If not, then the third party must refer the matter to the CONTRACTING PARTIES.

The *Understanding* did not, however, provide for the right of third parties to take part in panel proceedings. The next improvement came in the *1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures* (the *1989 Improvements*).[215] During the period between the *1979 Understanding* and the *1989 Improvements*, however, there was increased recognition of the role of third parties in GATT dispute settlement proceedings.[216] The question was the extent to which panels granted procedural rights to interested third parties to intervene in dispute settlement process.

In the case of *Japan—Measures on Imports of Leather*[217] brought by US against Japan, the Panel heard from Australia, the European Communities, India, New Zealand and

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[214]GATT BISD, 26th Supp., (1979) 210.

[215]GATT, BISD, 36th Supp., (1989) 61.

[216]Supra note 206 at 224.

[217]*Japan- Measures on Imports of Leather (Complaint by the United States)* (1984) L/5623, C/M/178; BISD 31S/94.

Pakistan as interested third parties. In *United States—Customs User Fee*,[218] a case brought by the European Union and Canada against the US, the Panel received submissions from Australia, Hong Kong, India, Japan, New Zealand, Peru and Singapore as interested third parties. In *United States—Restrictions on Imports of Sugar*,[219] where Australia was the complainant, the European Community, Argentina, Brazil, Canada, Colombia, Nicaragua and Thailand intervened as interested third parties.[220]

The legal basis of the procedural rights granted to third parties by panels was provided for in the *1989 Improvements*. Paragraph F of the *Improvement* provides that:

> 1. The interests of the parties to a dispute and those of the other contracting parties shall be fully taken into account during the panel process.
> 2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
> 3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submission to the third contracting party.

In retrospect, procedural rights granted to third parties to intervene in dispute settlement developed through the panel proceedings, and the various codifications, provided the formal legal basis for the exercise of that right. A third party's right to join the

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[218] *United States- Customs User Fee (Complaint by European Union and Canada)* (1988) L/6264, C/M/207; BISD 35S/245.

[219] *United States- Restrictions on Imports of Sugar (Complaint by Australia)* (1989) L/6514, BISD 36S/331.

[220] This does not provide an exhaustive list of cases in which certain procedural rights were granted to intervening third parties by panels.

consultation was, however, at the discretion of the contracting party to whom the request was addressed. Participation in the panel proceeding was also limited in a number of ways. A third party's access to the submission of the parties in dispute depends on the discretion of those parties.

One notable element missing in the development of third party right is that no substantial third party right developed alongside the procedural rights. This was because the position of third party in a dispute was seen more as a supporter of one of the parties to the dispute. The various panel reports indicated how the interests of third parties are taken into account,[221] but no right exists for third parties to ensure that implementation of recommendations by the party in breach takes cognisance of third party interests. In other words, third parties have no right to initiate steps to ensure compliance or ultimately to request the suspension of concessions or other obligations. Third parties, however, can set in motion the normal dispute settlement process as parties.

The rules and practice under the *GATT* on third party intervention and rights suggested that the system was marked by an underlying tension between a deference to party autonomy and the need to protect the interests of the dispute settlement system as a whole by taking into consideration the interest of third parties.[222] However, trying to limit third party intervention in a multilateral trade context raises particular difficult dilemmas.

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[221]Supra note 206 at 224 to228.

[222]Supra note 206 at 233.

International trade is inherently about economic interdependence.[223] Any change in terms of trade is seen as affecting the entire global economy and not just parties to a dispute. There is, therefore, a built-in pressure to permit intervention and broaden procedural rights further than those provided for in *1989 Improvements*.[224]

In subsequent panel proceedings, therefore, the practice developed where third parties with "substantial interest" in the dispute were granted what came to be known as "enhanced third party rights."[225] One notable case in this regard is the *EEC—Member States Import Regimes for Bananas*.[226] This was a case brought by five Latin American states[227] against six EEC member states,[228] challenging the granting of preferential Community access for bananas imported from ACP- Lome countries in the Africa, Caribbean and Pacific regions. Cameroon, Cote d'Ivoire, Jamaica, Madagascar and Senegal requested far broader participation in the work of the panel than that stipulated in the *1989 Improvements* as interested third parties.[229]

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[223]Chi Carmody, "Of Substantial Interest: Third Parties Under GATT" (1997) Michigan J.I.L. 615 at 621.
[224]Ibid.

[225]Antonis Antoniadis, "Enhanced Third Party Rights in the WTO Dispute Settlement Understanding" (2002) 29(3) Legal Issues of Economic Integration 285 at 289.

[226]*EEC- Member States Import Regimes for Bananas* (1993) DS32/R. The panel report in the case was, however, never adopted; see 34 ILM 1.

[227]Namely: Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela.

[228]Namely: France, Greece, Italy, Portugal, Spain, and Great Britain.

[229]Supra note 206 at 232.

This request was granted as the applicants indicated their agreement for broader third party participation for the above countries.[230] The agreement indicated that "these interested third parties should be invited to "attend all the panel's meetings and speak when invited to do so by the panel."[231] The representative of Costa Rica was quick to point out, however, that this agreement was not to be seen as creating any obligations which could be invoked as a binding precedent in the future.[232] The above five countries therefore took part in most, if not all, panel proceedings. In addition Brazil, Mexico and Philippines also made submissions to the panel.

The same procedural rights were extended to third parties in the second *Bananas Dispute*.[233] After consideration by the Panel and pursuant to agreement by the parties to the dispute, the Panel invited Belize, Brazil, Cameroon, Cote d'Ivoire, Dominica, the Dominican Republic, Jamaica, Madagascar, the Philippines, St. Lucia, St. Vincent and Grenadines and Suriname to attend panel sessions at which the parties to the dispute were present, and to make written and oral submissions during the first and second meeting of the Panel.[234]

Such was the state of affairs regarding third party right/intervention before the adoption of the *WTO Agreements* with its Annex 2, the *Understanding on Rules and Procedures*

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[230]Ibid.

[231]C/M/261 (Council Meeting of 24 March 1993), item 6 at 15-16.

[232]Ibid. at 16.

[233]*EEC- Member States Import Regimes for Bananas* (1994) DS38/R, reported at 30 ILM, 177-234 (1995).

[234]C/M/264 (Council Meeting of 16-17 June 1993), Item 4, 9 at 11-18.

Governing the Settlement of Disputes. Like most provisions of the *DSU*, the provisions on third party rights were codification of the GATT practice and the text of the *Improvement Decisions*.[235] The first two sections of the *1989 Improvements* were substantially reproduced in the first two sections of Article 10 of the *DSU*; and with the introduction of the Appellate Review,[236] third parties have also been granted certain procedural rights in appeal proceedings initiated by parties to the dispute. Article 10, the main provision on third party rights, provides:

> 1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
> 2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
> 3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.
> 4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such dispute shall be referred to the original panel wherever possible.

The *DSU* provisions on third party rights in panel proceedings are essentially a codification of GATT practices. Standing alone, Article 10.2 provides very broad procedural rights for third parties to participate in panel proceedings, but read together with paragraph 3, that participation is substantially limited to the first panel meeting. Article 10.3 limits third parties' rights to receiving only the first submissions of the

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[235] Supra note 206 at 235.

[236] Article 17 *DSU*.

parties and to make one submission. However, the paragraph makes third parties' rights to receive the submission of the parties to the dispute at the first meeting of the panel automatic, unlike the GATT practice where it depended on the discretion of the parties to the dispute. Article 10.4 also expressly provides for the right of third parties to have recourse to the normal dispute settlement procedure if measures already the subject of panel proceedings nullifies or impairs benefits accruing to it under any covered agreement.

In addition, the *DSU* provides for the automatic right of Members with "substantial trade interest" in an ongoing consultation pursuant to Article XXII.1 of the *GATT 1994*, Article XXII.1 of *General Agreement on Trade in Services* (*GATS*) or the corresponding provisions in other covered agreements to participate in the consultation.[237] This right is, however, subject to one qualification: the Member to whom the request is directed must agree that the Member has "substantial trade interest" in the matter.[238] Where the Member to whom the request is directed disagrees that the third party has "substantial trade interest" in the consultation, the third party can request consultation of its own.[239]

A much broader participation right is granted to third parties in appeal proceedings. Though third parties cannot appeal a panel report,[240] where appeal is instituted by any party to the dispute, "third parties which have notified the DSB of a substantial interest in

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[237]Article 4.11 *DSU*.

[238]Ibid.

[239]Ibid.

[240]Article 17.4 *DSU*.

the matter pursuant to Article 10.2 may make written submissions to, and be given the opportunity to be heard by, the Appellate Body."[341] Third parties have full procedural rights to participate in appellate proceedings where any party to the dispute appeals a panel report. "In appellate proceedings, this means that third parties will take part in the entire oral hearing and will sometimes be asked questions and/or given the opportunity to present a concluding statement."[242]

As noted by Footer, "[t]he text of the Improvements Decision, and the practice surrounding it form a vital link to the eventual provisions that are included in the DSU."[243] The only truly new element introduced under the *DSU* is at the appeal stage, where the right of third parties to intervene is guaranteed, provided they have previously notified their interest under Article 10.2 of the *DSU*.[244] Like the GATT provisions before it, the *DSU* does not contain any provision granting any substantive rights to intervening third parties. Third parties are excluded from panel proceedings under Article 21.3[245] and

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[341]Ibid. This is also supplemented by Section 24 of the Working Procedure of the Appellate Body of the WTO- "WORKING PROCEDURE FOR APPELLATE REVIEW".

[242]Allan Rosas, "Joinder of Parties and Third Party Intervention in WTO Dispute Settlement" in Friedl Weiss, ed., *Improving WTO Dispute Settlement Procedures: Issues & Lessons From The Practice of Other International Courts & Tribunals* (London: Cameron May, 2000) 77 at 85.

[243]Supra note 206 at 235.

[244]Supra note 206 at 244.

[245]Article 21.3 deals with the determination of reasonable period of time for the implementation of recommendation by the Member in breach.

Article 21.4[246] of the *DSU*, and from Article 22.6[247] arbitration.[248]

Implication for Developing Countries

As noted earlier, the resources needed to activate and maintain the dispute settlement process under the WTO *DSU* may hinder developing countries from having recourse to the DSM. The use of third party proceedings provides an alternative avenue for developing countries to challenge measures taken by other WTO Members. This assertion is supported by the trend of developing countries' participation in the dispute settlement process over the years— from the GATT era to the WTO. The participation of most developing countries in the dispute settlement processes is limited to participation as third parties.[249]

In that regard, the rights of third parties, both procedural and substantive rights, in the WTO DSM, should reflect the judicial and legal focus taken by the WTO dispute settlement. The procedural rights granted under the *DSU* limit, in a number of respects, effective third party intervention, and there is no substantive right accorded to intervening third parties. The exercise of the discretionary power by the panel or Appellate Body to

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[246]Article 21.4 deals with agreement by the parties to extend the duration of the dispute settlement process beyond 15 months.

[247]Article 22.6 refers to arbitration to determine the level of concession to be withdrawn where the Member in breach fails to comply with recommendation. Since third parties cannot take retaliatory action, they are permitted to participate in the arbitration.

[248]Supra note 225 at 290.

[249]Supra note 204.

grant enhanced third party rights has not been consistent and does not cover any substantive right that could be exercise by intervening third parties to ensure compliance.

The practice of the GATT/WTO with regard to third party rights suggest that the system is marked by an underlying tension between a deference to party autonomy and the need to harmonize the dispute settlement system as a whole by considering the interest of third parties.[250] While it is true that the primary focus in a dispute settlement process should be on the disputing parties,[251] the multilateral character of the trading system under the WTO requires a much broader consideration in dispute settlement.[252] As Rosas notes, "[g]iven the multilateral character of the WTO system, it is evident that all WTO Members have an interest in the outcome of a particular dispute and interpretations (clarification) furnished by the panel or Appellate Body."[253]

Examination of third party rights under the WTO, however, suggests too much emphasis on party autonomy from the consultation stage to compliance or retaliatory stage under the dispute settlement process. Article 4.11 provides for Members with "substantial trade interest" in an ongoing consultation to be joined in that consultation. This right to be joined in consultation is, however, dependent on the agreement of the Member to whom

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[250]Supra note 206 at 233.

[251]Nick Covelli, "Third Party Intervention Jurisprudence" (2003) 37.3 Journal of World Trade 673 at 676.

[252]Supra note 225 at 636.

[253]Supra note 242 at 77.

the request for consultations was addressed that the claim for "substantial trade interest" is well-founded.[254]

Basing the right of third parties to join in consultation on the discretion of the Member requested detracts from the rule-oriented path of dispute settlement under the WTO. Small developing countries are likely to allow third parties to join in consultation to avoid multiple dispute settlement processes for lack of resources, while developed countries are more likely to deny third parties the right to join an ongoing consultation. It has, however, been observed that many small and poor developing countries feel that, by joining in the consultations, they can at least have a clear idea as to whether a particular dispute will have implications for their own interest.[255]

Defending parties have sometimes refused to allow third parties to take part in consultations.[256] The term "substantial trade interest" does not have any precise definition,[257] and individual Members are likely to give contradictory meaning depending on their willingness to allow third parties to join a particular consultation. It has,

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[254]Article 4.11 *DSU*.

[255]S. Nayaran, "Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification"- Working Paper 117 Indian Council for Research on International Economic Relations,1 at 49 online: <http://www.icrier.in/wp117.pdf>.

[256]Ibid. at 48. See also Allan Rosas supra note 242 at 80.

[257]See Chi Carmody, supra note 223 for detailed discussion on "substantial trade interest".

therefore, been suggested that at the stage of consultations, any interested Member should be allowed to become a third party to consultations.[258]

Article 10, the principal section on third party intervention in dispute settlement, emphasizes the multilateral focus of the WTO dispute settlement by providing that the interest of parties to the dispute and of other Members shall be taken into account during the panel process.[259] In the context of third party intervention, Article 10.2 provides that Members having "a substantial interest" have the right to make written submissions and to be heard by the panel. However, Article 10.3 by implication limits third party intervention—the right to make submissions and be heard by the panel—to the first meeting of the panel.[260] Third parties are only entitled to receive the first submissions of the parties to the dispute at the first meeting of the panel.

While these procedural rights have proved adequate for Members who simply want to provide their views to a panel, Members with a more pressing interest in the matter have found these procedural rights inadequate.[261] Suppose, a dispute is brought by Member A against Member B concerning a preferential trading arrangement between Member B and Member C, D and E, and Members C, D and E intervene as third parties. The

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[258] *Review of the Dispute Settlement Understanding (DSU)*, Discussion Paper from the European Communities (October 1998), Job No. (98) 5602.

[259] Article 10.1 *DSU*. See also Chi Carmody, supra note 223 at 637.

[260] Nick Covelli, "Public International Law and Third Party Participation in WTO Panel Proceedings" (1999) 33(2) Journal of World Trade 125 at 126.

[261] Supra note 251 at 675.

participatory rights granted to these third parties are limited to attending the first meeting of the panel, being heard and making a submission at that first hearing of the panel. Member B, as party to the dispute, however can attend all the hearings and hear all arguments of Member A and make counter-arguments.

The interest of Member C, D and E in the preferential trading arrangement may in some instance outweigh that of Member B, as is usually the case where a developed country enters into a preferential trade agreement with developing countries. Where such trading arrangement is challenged and the developed country becomes a defendant under the WTO *DSU*, intervening developing countries participating as third parties are limited by the procedural rights granted under the *DSU* from effectively stating their case in panel proceedings. Such third parties may not, in some instances, be able to have recourse to Article 10.4 as the benefits nullified or impaired are not benefits directly derived from any WTO agreement, but from bilateral or other trade arrangements.

It should be noted that the participatory rights granted to third parties in appellate proceedings are more extensive than those provided for in panel proceedings.[262] The right to appeal is limited to parties to the dispute, but where any of the parties appeal, third parties are granted full participatory rights in the appeal proceedings.[263] Article 17.4 provides that "[t]hird parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be

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[262]Supra note 242 at 85.

[263]Ibid.

given an opportunity to be heard by, the Appellate Body." There is no limitation on the number of submissions third parties can make and no limitation on the number of the parties' submissions that can be received. Nor is there any limitation on the number of appellate proceedings third parties can attend.

Lacking entirely under the *DSU* are third party substantive rights. Article 10.2 provides that the submissions of third parties must be reflected in the panel report. Implementation of recommendations by the Member in breach must, in essence, take into consideration third party interests as reflected in the report. The question not answered under the *DSU* is what happens when implementation does not take into consideration third party interests?

Third parties are excluded from Article 21 proceedings regarding setting time for implementation of recommendation and from Article 22 proceedings regarding compensation and the suspension of concession for failure to implement recommendations. In addition, third parties are excluded from initiating Article 21.5 arbitration to determine whether measures taken to comply with recommendations satisfy third party interests. The only avenue available for third parties is to initiate a new dispute settlement process by requesting consultation, then moving to panel proceedings.[264] However, in that case, the matter is no longer about the implementation of recommendations, but starting afresh a new dispute settlement process.

[264] Article 10.4 *DSU*.

The Arbitration panel rulings in the *Bananas Case* arbitration to determine the level of suspension of concessions under Article 22 clearly brings to light the deficiency in third party rights.[265] The Banana Arbitrators explicitly denied Ecuador's request to participate as a third party, implying that "WTO-consistency of measures could be decided in procedures from which co-complainants and third parties are excluded and by a decision which will not be submitted to the formal scrutiny of the DSB and all WTO Members, not to speak of the Appellate Body."[266]

In effect, the alternative procedure for developing countries' participation in WTO dispute settlement process—third party proceedings—provides limited procedural rights for participation and provides no substantive right for a successful conclusion of the dispute. Strengthening the WTO DSM calls for strengthening all aspects of the dispute settlement process, including third party intervention and rights, particularly considering the multilateral character of the WTO system. International economic relations are interdependent, and the interests at stake in a particular dispute go beyond the interests of only parties to the dispute. The dispute settlement mechanism should, therefore, provide effective mechanisms for third parties whose interests are at stake to ensure that satisfactory implementation takes cognisance of those interests.

Strengthening third party participation in consultation requires that Article 4.11 of the DSU, which provides that third parties' right to join consultation is subject to the

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[265]Decision of Arbitrators of 6 April 1999 (WT/DS27/ARB).

[266]Supra note 242 at 86.

agreement of the party to whom the request for consultation is made, should be avoided. The qualification of "substantial trade interest" provides discretion for parties to disagree on whether a Member is entitled to join consultation as a third party. Any Member with trade interest in a dispute should be allowed to join the consultation. A possible downside to this is the increase in number of Members wishing to participate in dispute as third parties. This could be avoided by providing specific standards for what qualifies as "trade interest" to merit participation as third parties.

Further, third parties' participation in panel proceedings needs to be extended beyond the present first meeting of the panel. The like provision of Article 10.3 of DSU which limits third parties' right to receiving only the first submission of the parties should be avoided. Third parties should be entitled to receive all submissions of parties to the dispute and be heard during all panel proceedings. The downside of intervention may be that it may complicate judicial proceedings, potentially distracting the focus from the immediate parties and possibly prejudice the interest of the parties. However, Article 10.1 enjoins that the interest of parties to the dispute and those of other Members must be taken into account during the panel process. The interest of other Members cannot be taken fully into account unless those Members fully participate in the panel process. Further, the conduct of panel proceedings in instances where enhanced third party rights have been granted indicates that such potential downsides to extending third party rights are over-stated.

For third parties to be able to ensure that implementation of recommendations take into account their interest, they should be included in Articles 21 and 22 proceedings, especially where it is found that measures taken negatively affect their interest. Where implementation does not take into account the interest of third parties, review procedure should be put in place rather than the present system where third parties have to initiate a fresh dispute settlement proceeding.

As already indicated, proposals have been put in place by both developing and developed countries to clarify third party rights in the dispute settlement process. Enhanced third party rights in the dispute settlement process in effect enhance developing countries use of such a process to ensure that their interest is taken fully into account in any ongoing trade dispute settlement.

PARTICIPATION OF NON-STATE ACTORS IN WTO DISPUTE SETTLEMENT

The *Agreement Establishing the World Trade Organization* is silent regarding its relationship to the individual.[267] The Preamble of the *Agreement*, however, makes it clear that the subjects of the *Agreement* are not individual traders but state Members.[268] In like manner, the *Understanding on Rules and Procedures Governing the Settlement of Dispute* does not provide for the participation of non-state actors in the dispute settlement process under the WTO. According to Charnovitz, this could create the erroneous conclusion that international trade is carried on between governments (or between nations) and that the intended beneficiaries of WTO Agreements are only government Members of the WTO.[269]

However, a closer look at the international trading system created under the WTO indicates that private parties are the indirect beneficiaries of the benefits deriving from the multilateral trading system.[270] Producers, service providers, exporters and importers are the operators under the multilateral trading system created under the WTO. In that regard, most disputes arising under the WTO are directly linked to the activities of private parties. In other words, where it is alleged that there is nullification or impairment

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[267]Steve Charnovitz, "The WTO and the Rights of the Individual" online: WorldTradeLaw.net <http://www.worldtradelaw.net/articles/charnovitzindividual.pdf>.

[268]The use of the term "reciprocal arrangement" and "international trade relation" in the Preamble emphasize the inter-state nature of the WTO agreements.

[269]Supra note 267 at 1.

[270]Glen T. Schleyer, "Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Settlement System" (1996) Fordham Law Review 2275 at 2293-2294.

of any benefit derived from any WTO Agreement, certain private actors are directly involved one way or the other. As one writer puts it, "businesses violate WTO obligations and states are held accountable"; and business opportunities are nullified or impaired and states initiate WTO dispute settlement.[271] It should be noted that this is not to deny that majority of WTO disputes involve measures taken by governments. The point here is that such measures in the majority of cases affect the interest of private parties who are the real actors in the international trading system.

Strengthening the WTO DSM, therefore, calls for the recognition of the interest of private parties or non-state actors in the dispute settlement process. The next section examines how exclusion of private parties from the dispute settlement process affects developing countries' participation in the dispute settlement process under the WTO and the WTO in general. It is the contention here that private participation in the WTO dispute settlement process will in effect enhance developing countries' participation. There are potential downsides to allowing private participation in the WTO DSM. And WTO Members may not be willing to allow private participation in the WTO DSM. What is argued for here, therefore, is not private participation at the level of WTO DSM but providing for a domestic mechanism under the *DSU* that allow private parties to lunch complaints for violation of WTO rules.

[271]Ernesto Hernandez-Lopez, "Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Dispute" (2003) 35.3 Journal of World Trade 469 at 475.

Inter-State Dispute Settlement Mechanism Under the WTO and Developing Countries.

The WTO Agreements are essentially agreements between states, conferring obligations and rights on states.[272] The Preamble of the *WTO Agreement* provides that the objectives of the WTO are to be achieved "by entering into *reciprocal and mutually* advantageous arrangements . . . in *international trade relations*."[273] This makes it clear that the focus of the *WTO Agreement* is not private parties, but "rather the meshing of governmental policies."[274] Governments in principle thus retain the monopoly to implement obligations embodied in WTO agreements.[275]

The DSM provided for under the *DSU* for the resolution of WTO disputes reflects this focus. Article 3.2 of the *DSU* provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it *serves to preserve the rights and obligations of Members* under the covered agreements . . ."[276] The WTO DSM is exclusively an intergovernmental forum for resolving trade disputes arising under any of the covered

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[272]Petros C. Mavroidis & Werner Zdouc, "Legal Means to Protect Private Parties' Interests in the WTO: The Case of the EC New Trade Barriers Regulation" (1998) 1.3 Journal of International Economic Law 407 at 409.

[273]Emphasis added.

[274]Supra note 267.

[275] Patricia Brandstetter, "Participation of NGOs in the WTO Dispute Settlement System" 9. online: <http://www.univie.ac.at/intlaw/i_publikationen/publ_pdf/Brandstetter.pdf>.

[276]Emphasis added.

agreements. Governments, therefore, not only retain monopoly over implementation of WTO obligations, but also over the enforcement of those obligations.[277]

The state-to-state dispute settlement mechanism under the WTO *DSU* has generated a lot of commentary from scholars over the years, both in favour and against.[278] Two main reasons account for such reaction. First, WTO Agreements regulate economic relations, and second, the economic activities that are regulated are carried on by non-state actors (the very actors excluded from the dispute settlement process). As Mavroidis and Zdouc note, "[t]he WTO contract is essentially a government contract with important repercussions on private parties' interests."[279]

Two reasons account for the inter-state nature of the WTO DSM. First, WTO agreements are perceived to be inter-governmental agreements and second, the jurisprudence and development of the dispute settlement mechanism from the GATT era. As noted earlier, the current WTO DSM is the evolutionary stage of the process started under the *GATT*. The GATT was a small club of 23 like-minded countries, and its dispute settlement

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[277]Supra note 272.

[278]See G. Richard Shell, "Participation by Non-Governmental Parties in the World Trade Organization: The Trade Stakeholders Model and Participation by Non-State Parties in the World Trade Organization" (1996) 17 U Pa J Int'l Econ L 359: P. M. Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties" (1996) 17 U Pa J Int'l Econ L 295: Joel P. Trachtman & Philip M. Moremen, "Cost and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?" (2003) 44 Harvard International Law Journal 221.

[279]Supra note 272 at 407.

process was thus based on diplomatic negotiations and political manoeuvres.[280] As the dispute settlement process developed into a judicial dispute settlement mechanism, it retains some of diplomatic and political features utilized to settle GATT disputes. The inter-state nature of the dispute settlement mechanism is one of those features.

However, the movement of the WTO DSM towards a more legalistic system for international trade dispute resolution has been based on separating political influences and motives from the dispute settlement system.[281] The inter-state dispute settlement system, that allows only nations to challenge illegal trade practices, ensures that the initial filing of a complaint and its continued vitality is susceptible to political subversion.[282] As governments are parties to the dispute, the continuity and conduct of the whole dispute settlement is left to the political will of the government.

An inter-state dispute settlement mechanism riddled with political influence puts developing countries at a disadvantage considering their low political and economic influence in international trade.[283] As noted earlier, one of the factors preventing the use

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[280] Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (USA: Butterworth Legal, 1993) at 29.

[281] Glent T. Schleyer, "Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Settlement System" (1996) Fordham Law Review 2275 at 2293.

[282] Ibid. at 2277.

[283] Beatrice Chayton, "Dispute Settlement Under the GATT/WTO: The Experience of Developing Nations" in James Cameron & Karen Campbell, eds, *Dispute Resolution in the World Trade Organization* (London: Cameron May, 1998) 250 at 253.

of the GATT DSM by developing countries is the fear that instituting complaints against a developed country member would result in hostile retaliation by the latter.[284]

Most developing countries are dependent on developed countries for their needs, in terms of financial and military assistance, loans, financial aid and other developmental assistance. In such instances, developing countries' governments are hesitant to institute complaints against such developed countries for illegal trade practices. No matter how egregious a trade violation is, developing countries' governments are unwilling to take the political risk associated with initiating a dispute under the WTO dispute settlement system, notwithstanding the effect of the illicit trade policy on private parties.[285]

In addition, governments' decision to institute a complaint under the WTO dispute settlement system against another Member is less influenced by private parties' interests than by the present and future trade policies of that government.[286] Governments may refrain from complaining against illegal trade practices of another Member because the government might do the same thing or want to preserve its ability to do the same thing.

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[284]Ibid. See also, Kofi Oteng Kufour, "From GATT to the WTO: The Developing Countries and Reform of the Procedures for the Settlement of International Trade Disputes" (1997) 31.5 Journal of World Trade 117 at 129.

[285]Supra note 281 at 2277.

[286]Petros C. Mavroidis, Thomas Cottier, William J. Davey, etc., "Is The WTO Dispute Settlement Mechanism Responsive To The Needs Of The Traders? Would A System Of Direct Action By Private Parties Yield Better Result?" (1998) 32.2 Journal of World Trade 147 at 151.

Gary Horlick referred to this dilemma as a "glass-house problem"[287]: "Governments in glass-houses do not throw stones. Governments will not challenge each other if they feel vulnerable."[288] And most governments in this "glass-house", or in this vulnerable position, are those of developing countries.

In effect, eliminating private parties from the WTO dispute settlement process, thus making the system an absolute inter-state dispute settlement system, opens the system up to political influences that do not function well for developing countries. In a dispute settlement system where private parties could initiate disputes over the legitimacy of a nation's action, the system could be less susceptible to political pressures, and claims raised by a private party against a nation, unlike a claim raised by one nation against another, would not be interpreted as a diplomatic attack or manoeuvre.[289]

Further, allowing private parties to participate in WTO dispute settlement will reflect the reality in international trade that private parties are the real or primary actors in world trade today, and it is their investment and trading activities that are harmed by illicit trade policies.[290] This position is recognized in the WTO panel decision in the case of *United States – Section 301*[291]. The Panel Report states that:

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[287]Ibid.

[288]Ibid.

[289]Supra note 281 at 2277.

[290]Supra note 281 at 2277; see also Mavroidis and Zdouc supra note 272 at 408.

[291]*United States- Sections 301-310 of the Trade Act of 1974* (*Complaint by the European Communities*) (1999), WTO Doc. WT/DS52/R.

> Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depends on the activity of individual economic operators in the national and global market places. The purpose of many of their disciplines, indeed one of the primary objects of the GATT/WTO, as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[292]

A number of valid arguments have been put forward as to why private parties must be excluded from the WTO DSM.[293] First, private participation would undermine apparent authority, and thus the ability of nations to negotiate trade policies.[294] That is, the expansion of standing to include private parties would lead to the spectacle of private parties opposing the positions of the governments that are supposed to represent them. A state-to-state dispute resolution system has the advantage of discretion in allowing greater room for persuasion and negotiation. Private rights of action would take such control away from states in the dispute settlement process.

Second, that private participation would result in inequity of standing as only few would be able to take advantage of the dispute settlement process under WTO.[295] Private parties with the greatest economic resource would probably benefit most from the expansion of participation, creating a large imbalance between wealthier multinational corporations—

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[292]Ibid. para. 7.73.

[293]Philip M. Nichols, "Extension of Standing in World Trade Organization Disputes to Non-Governmental Parties" (1998) 17 U. Pa J Int'l Econ. L. 295; Joel P. Trachtman & Philip M. Moreman, "Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?" (2003) 44.2 Harvard International Law Journal 221.

[294]Nichols, ibid. at 316.

[295]Ibid. at 318.

most of which are in developed countries— and smaller businesses in developing countries. In other words, expansion of standing to under the WTO DSM to include private parties provides the opportunity for wealthier multilateral corporations to exert powers that could destroy whatever balance already exists.

Third, private participation would undermine the goal of free trade because the low public profile of international trade policy has been one of the largest contributors to trade liberalization over the past fifty years.[296] That is, private participation will have an effect on the type of commitments states are willing to make.[297] States might turn to making fewer commitments. In that case, the solution is not the exclusion of private parties from WTO dispute settlement process,[298] but the articulation of an effective and efficient level of private or individual access within the existing WTO framework acceptable to WTO Members.

These arguments may warrant the exclusion of private parties, the economic actors in international trade, from initiating WTO dispute under the DSM. However, some level of private participation is needed to reduce political influence (that tied the hands of governments in developing countries) in the process. The argument here is to provide some domestic mechanisms through which private parties, affected by violation of WTO rules, can seek redress. In that regard, these possible downsides are avoided and more

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[296]Ibid. at 319.

[297]Trachtman & Moreman, supra note 293 at 223.

[298]Supra note 272 at 407.

validity is given to WTO agreements as it becomes a truly commercial agreement regulating trade across borders.[299]

Individual Access: Framework for Giving Domestic Effect to WTO Obligations.

Strengthening the WTO DSM to create a level playing field for the primary actors in international trade calls for separating political influence and motives from the dispute settlement mechanism. This in effect calls for providing a more legal and judicial focus to the WTO DSM. A sure way to do this is to allow private parties to participate in the dispute settlement process.[300] As noted earlier, a development in that direction is likely to affect the sort of commitments that governments will be willing to make. One should, therefore, be careful in advocating for a particular model of individual access. As Pauwelyn notes:

> The reality today indicates that acceptance of many of these suggestions to strengthen the WTO enforcement mechanism . . . is far away. It would therefore be wrong to take these important steps precipitously and without extensive discussion; doing so could threaten the political support and legitimacy of the WTO, in general, and of its dispute settlement decisions, in particular.[301]

In that regard, individual access should fall in line with the existing framework of the WTO, as a whole, and the dispute settlement mechanism, in particular, and at the same time, be acceptable to all WTO Members. A number of commentators have argued for models ranging from granting full access to individuals in the dispute settlement

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[299] Supra note 281 at 2294.

[300] Supra note 281 at 2293.

[301] Pauwelyn Joost, "Enforcement and Countermeasures in the WTO: Rules are Rules- Toward a More Collective Approach" (2000) 94 American Journal of International Law 335 at 347.

process[302] to allowing the WTO Secretariat to institute complaints on behalf of private parties before the WTO.[303] Feasibility of these approaches is very much in question given the level of commitments governments have given to the operation of the WTO DSM.

Though private parties are excluded from the WTO dispute settlement process, a number of WTO Agreements provide some procedural rights for private complaints and, in some instances, a more structured dispute settlement system. Such instances exist under the *Agreement on Trade Related-Aspects of Intellectual Property Rights*[304] (hereinafter, *TRIPS Agreement*), *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*),[305] and under the *Government Procurement Agreement* (*GPA*).[306] Instances also exist under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*[307] (hereinafter, *Antidumping Agreement*).

To provide a mechanism for enforcing rights guaranteed indirectly to private parties under the *TRIPS Agreement*, a number of provisions make it obligatory for every government to put in place mechanisms to enable an economic actor to institute administrative or judicial proceedings against any infringement of his intellectual

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[302]See Schleyer, supra note 281.

[303]Steve Charnovitz, "Participation of Non-Governmental Organizations in World Trade Organization" (1996) 17 U. Pa. J. Int'l L. 331 at 350.

[304]The *TRIPS Agreement* is attached as Annex 1C to the *WTO Agreement*.

[305]This *Agreement* is included as part of Annex 1A to the *WTO Agreement*.

[306]This *Agreement* is part of the Plurilateral Agreements included under *WTO Agreement* Annex 4.

[307]Supra note 305.

property rights.[308] Article 51 of the *TRIPS Agreement* specifically requires governments to adopt procedures that permit the right holder to ask the Customs Authorities to block free circulation of goods lacking authentic copyright or trademarks. To provide directly for the rights guarantee under the *TRIPS Agreement* and to provide for these private causes of action calls for domesticating the TRIPS obligation, and most WTO Members now have domestic legislations guaranteeing these rights. This makes *TRIPS Agreement* the "most self-enforcing of all the WTO agreements."[309]

The *Antidumping Agreement* also contains a number of provisions that allow private parties to resolve antidumping disputes in a domestic setting applying WTO rules. The *Agreement* requires governments to initiate an antidumping investigation upon the application by a domestic industry.[310] Once government commences such investigation, a more structured dispute settlement process follows where all affected parties can participate. Interested parties that can participate include the government of the country of export, the foreign exporter or producer, the importer, a trade or business association whose members are producers or importers or exporters, the producer of the competing product in the country of importation, and an association whose members produce the like product in the country of importation.[311]

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[308] *TRIPS Agreement* Articles 22.2, 23.1, 26.1, 28.1, 31(i), 39.2, 41, 42, & 46.

[309] Supra note 267 at 10.

[310] Article 5.1 *Antidumping Agreement.*

[311] Article 6.1 *Antidumping Agreement.*

To ensure participation in the process by interested parties, governments incur a number of procedural duties upon commencing an antidumping investigation. These include: (1) to give notice of the investigation to the public and to interested parties; (2) to allow interested parties ample opportunity to present evidence and to defend their interests; (3) when an exporter has offered to raise prices in order to avoid an antidumping duty, to give the exporter a reason if such offer is rejected and to allow the exporter to make comments thereon; (4) to offer judicial review; and (5) to give interested parties the right to seek sunset review of the continued need for an antidumping duty, and then to terminate the duty if no longer needed.[312]

The *Agreement on Subsidies and Countervailing Measures* also contains similar provisions regarding the investigation of foreign government subsidies and the imposition of countervailing duties. The *SCM Agreement* requires governments to allow all affected individuals to participate in the investigation process. Further, mechanisms should be put in place for judicial review.

The WTO *Government Procurement Agreement*[313] also introduces challenge procedures for private parties to check whether government behaviour in the field of government procurement is in conformity with the relevant WTO rules. Article XX allows private parties to invoke WTO law before national jurisdiction. In other words, the provision

[312]Articles 6.1, 12.1, 12.2 (notice) 6.2, 6.9 (defence) 8.3 (undertakings) 13 (judicial review) 11.2 (sunset review): Supra note 267 at 8.

[313]It must be noted that the *Government Procurement Agreement* is one of the Plurilateral Agreement under the WTO.

requires government to establish a challenge procedure under which private parties can challenge government procurement practices, when such practices are incompatible with the WTO *Government Procurement Agreement*.[314]

All these agreements provide for private participation in dispute resolution involving WTO rules. However, one trend running through all of them is that such participation is confined to domestic mechanisms and excludes participation at the WTO dispute settlement level. One can safely conclude that governments are willing to accept some form of private participation in dispute resolution involving WTO rules at the domestic level. The focus then should be on addressing how best to make such mechanisms more effective, and integrating them, at the WTO DSM level.

Allowing private parties full access to the WTO DSM will "deemphasize and depoliticize many relatively minor trade or economic complaints that now exist between nations."[315] Further, it will negate the glass-house problem and, more particularly, free governments in developing countries from political pressures and considerations associated with initiating complaints under the WTO dispute settlement system. However, as Mavroidis notes, such a model of private participation still remains 'wishful thinking' given the present economic and political commitment attached to the WTO.[316] Exploring private participation within domestic settings thus remains the most viable option.

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[314]Supra note 272 at 413.

[315]Supra note 281 at 2294.

[316]Supra note 272 at 407.

Private participation within the framework of domestic settings call for harmonizing the systems provided for under the various WTO Agreements that allow private right of action based on WTO rules. Such systems will be more effective if centralized under the dispute settlement mechanism provided for under the WTO *DSU*. In that regard, provisions under the *DSU* mandating governments to set up mechanisms for private parties to challenge both private and government actions that are inconsistent with WTO rules will unify private participation provided for under the various agreements.

It should be noted that United States and the European Community both have mechanisms in place for private complaints regarding practices of other countries that are inconsistent with WTO rules. The US Section 301 of the *Trade Act of 1974*[317] provides a mechanism for private parties in the United States to lodge a complaint against any unfair trade practices of other countries. So also does the *Trade Barrier Regulation* (*TBR*) *of 1994*[318] apply to private parties within the European Community. These mechanisms are at the disposal of wealthier multinational corporations incorporated in these developed countries to use against nations in breach of WTO obligations.

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[317] 19 USC 2411. For general discussion on Section 301 and the WTO, see: Matthew Schaefer, "Section 301 and the World Trade Organization: A Largely Peaceful Co-existence to Date" (1998) 1.1 Journal of International Economic Law 156.

[318] Council Regulation (EC) No. 3286/94 of 22 December 1994, 347/71 of 31 December 1994. For a thorough discussion of this legal instrument, see: M.C.E.J. Bronckers, "Enforcing WTO Law Through the EC Trade Barriers Regulation" (1997) 3 International Trade & Law Regulation 76.

Mandating a domestic dispute settlement mechanism under the *DSU* not only opens up these existing mechanisms to private parties in these developed countries, but also allows private parties from developing countries to initiate complaints against practices of both governments and private parties in the US and EC that are incompatible with WTO rules. In addition, such domestic dispute settlement mechanisms attract more international credibility and legitimacy since they function under the WTO Dispute Settlement Body and proceedings are more transparent.

Further, the system is likely to be acceptable to WTO Members (judging from their acceptance of such mechanisms under a number of agreements), since governments still maintain the discretion to comply with outcomes of such dispute settlement processes. Moreover, governments still retain the monopoly of initiating a state-to-state dispute settlement process under the WTO (as is the present practice) where outcomes of domestic dispute settlement processes prove unacceptable or unsatisfactory or where there is no compliance. These negate the possible downside where wealthier multinational corporations may exert power on developing countries thereby destroying whatever balance that might already exist in the operation of the state-to-state dispute settlement process. A likely problem that may be encountered under the domestic mechanism is government interference in the process, thereby perpetuating the political manoeuvre in the process. However, this problem can be prevented by providing for a monitoring mechanism under the *DSU* that is supervised by the DSB.

In such instances, not only is the dispute settlement process under the WTO separated from political motivation, but also the process becomes more transparent. Example, a dispute initiated by Ashanti Goldfields Company (a company incorporated in Ghana) against import duties imposed by US Government on gold bars from Ghana will not be interpreted as political motivated action. In addition, the primary actors in international trade are able fully to reap the economic benefits of free trade as there is likely to be higher global compliance with trade agreements. Further, these parties can more accurately predict future trade conditions, thus allowing them to maximize the value of their resources by participating in international trade.[319]

As the process already stands, domestic mechanisms provided for in developed countries enable private parties in those countries to voice their concerns where violations of WTO rules affect them. The process is not open to private parties from other countries, creating unequal opportunities between private parties in developed countries and those in developing countries. It is the writer's view that developing countries are better off where the domestic mechanism is mandated under the *DSU*, and thus open to all private parties irrespective of countries of operation. It should be noted that, this does not, in anyway, increase developing countries' use of the DSM but possibly pre-empts the situation where governments in developing countries are put in the position to resort to that process, a process that governments in developing countries are not willing to resort because of the fear of political, economic and diplomatic retaliation that may follow. In effect, the fear of political repercussion that might follow from initiating a dispute against a developed

[319]Supra note 281 at 2277 & 2293.

country will be minimized, if not eliminated. This is because WTO rules then operate as a truly commercial agreement regulating conduct of international commerce and trade.

Before concluding this chapter, it should be noted that there have been a number of recent developments under the WTO dispute settlement system relating to private participations that are of particular interest to developing countries participation.[320] The first such development is the Appellate Body ruling permitting private counsel to represent governments in panel proceedings.[321] The Appellate Body Report specifically indicates that the use of private counsel is particularly significant for developing country Members to enable them to participate fully in dispute proceedings.[322]

In addition, not only does private counsel represent governments in dispute proceedings before the WTO, but private counsel representing private parties (affected by violation of WTO rules) also assist governments in dispute settlement proceedings before the

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[320]See Ernesto Hernandez-Lopez, "Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes" (2001) 35.3 Journal of World Trade 469.

[321]*European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complaint by the United States)* (2000) WT/DS27/AB/R (Appellate Body Report).

[322]Ibid. para. 17.

WTO.[323] Lopez notes that "[b]y providing relevant points of view of business, private counsel adds an element of private participation in WTO disputes."[324]

The last but not the least of these developments is allowing private parties or non-state actors to submit *amicus curiae* briefs. The WTO Appellate Body ruled in the *Shrimp/Tuttle Case*[325] that non-state actors could submit *amicus curiae* briefs in panel proceedings whether requested by the panel or not. This was based on interpretation of Article 13 *DSU*.[326] However, private parties have yet to use this option which has been mainly utilized by non-governmental organizations (NGOs).[327]

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[323]See Jeffrey L. Dunoff, "The Misguided Debate over NGO Participation at the WTO" (1998) 1.3 Journal of International Economic Law 433 at 441-448 for discussion on how private counsel of Fuji and Kodak companies assisted governments of Japan and US respectively in the Kodak/Fuji Dispute.

[324]Supra note 320 at 485.

[325]*United States- Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia, etc)* (1998), WT/DS58/AB/R (Appellate Body Report) online: <http://wto.org/wto/dispute/distab.htm>.

[326]Article 13 *DSU* provides that "[e]ach panel shall have the right to seek information and technical advice from any individual or body."

[327]Further reading on *amicus curiae* briefs in WTO dispute settlement, see Hernandez-Lopez, supra note 115 at 17-27: Petros C. Mavroidis, "Amicus Curiae Briefs Before The WTO: Much Ado About Nothing" (2002), online: < http://www.worldtradelaw.net/articles/mavroidisamicus.pdf>.

CONCLUSION

The WTO provides for a multilateral trading system. The dispute settlement mechanism provided for under the WTO DSU for resolving trade disputes arising under the WTO must, therefore, take into account the multilateral nature of these disputes.

Disputes arising under the WTO affect Members other than the parties to the dispute. An effective and unified avenue of addressing the ripple effect of such disputes on these Members is to provide effective procedural and substantive rights for them to participate in the dispute settlement process as third parties. In addition, an efficient mechanism should be put in place for participating third parties to ensure that implementation of recommendations takes into account the interest of third parties.

Further, though WTO rules are international agreements between states, and are intended to regulate the conducts of governments, the economic actors within the international trading system are private parties. In other words, the agreements and procedures of the WTO have a major impact on the daily operations of the business community. Private parties are the economic actors within the business community. Ensuring the validity and relevance of outcomes of WTO dispute settlement processes requires participation of the economic actors, private parties. A starting point for involving private parties in the WTO dispute settlement process is providing a framework within the current WTO structure to allow private participation. Bringing private parties into the WTO DSM, however, has a number of downsides that can possibly offset the balance already existing in the system. The feasibility of such proposal is even called into question. In addition, giving private

parties unrestricted access in the WTO DSM may benefit only the wealthiest of multinational corporations, perpetuating the power situation and influence of the strong over the weak.

A more feasible proposal is to harmonize existing mechanisms provided under a number of WTO rules that allow private participation within a domestic mechanism. This in effect requires the opening up of such domestic mechanisms already put in place by developed countries for use by private parties in those developed countries to all other private parties, including those in developing countries. A more transparent domestic mechanism for challenging violation of WTO rules provides a truly commercial perspective to WTO rules.

Enhancing third party rights/intervention in the WTO dispute settlement process not only will strengthen the WTO DSM, but also will enhance participation of developing countries in the process. A number of disputes arising under the WTO are of interest to developing countries. Providing effective third party intervention and rights provides an attractive alternative for developing countries to join in disputes affecting their interests.

Allowing private participation in WTO dispute settlement within domestic settings opens up the dispute settlement process and minimizes political influences in the process. First, domestic dispute settlement regarding violation of WTO rules reduce the risk of attaching political motives to initiation of dispute settlement. Second, settlement within domestic mechanisms pre-empts the need to have resort to the WTO dispute settlement process,

which is more heavily riddled with political influence. Minimum political influence in the dispute settlement process in turn minimizes the influence of power-related factors in the process, providing a more judicial outlook to dispute settlement under the WTO. This in turn creates a level playing field for all economic actors within the multilateral trading system. Further, this negates developing countries' fear of political and economic repercussions that follow from initiating dispute against a developed country under the WTO DSM.

CHAPTER FOUR

ALTERNATIVE DISPUTE SETTLEMENT UNDER THE WTO DISPUTE SETTLEMENT MECHANISM

INTRODUCTION

As noted earlier, rules do not enforce themselves.[328] To ensure that rights and obligations conferred by rules are respected and enforced requires an effective dispute settlement and enforcement mechanism.[329] The multilateral trading arrangement created under the WTO is based on rules that require a strengthened dispute settlement mechanism to ensure an effective international trading system. The dispute settlement mechanism under the WTO *DSU* is, therefore, a central element in the functioning of the multilateral trading system.

It has been argued that enhancing participation in the dispute settlement mechanism under the WTO, especially the participation of developing countries, calls for strengthening the dispute settlement mechanism. This providing strengthening the remedies and enforcement mechanisms provided for under the WTO, enhancing third party participation, and providing some level of private party participation to reduce the inter-state dispute settlement process. Legalization and judicialization of the dispute settlement mechanism not only eliminates the influence of power-related factors in the dispute settlement process, but also provides a more effective forum for adjudicating international trade dispute among all states—developing and developed countries.

It is argued in this chapter that strengthening the dispute settlement mechanism under the

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[328]Ernst-Ulrich Petersmann, "Alternative Dispute Resolution- Lessons for the WTO" in Friedl Weiss, ed., *Improving WTO Dispute Settlement Procedures: Issues & Lessons From The Practice of Other International Courts & Tribunals* (London: Cameron May, 2000) 27 at 27.

[329]Ibid.

WTO requires providing alternative mechanisms.[330] As the WTO dispute settlement processes (panel and Appellate Body proceedings) assume their legal and judicial nature, certain kinds of disputes will require other alternative dispute resolution mechanisms for effective settlement. In addition, a number of WTO Members may prefer to settle their disputes through a mechanism other than the legal and judicial framework. To sustain the judicial dispute settlement mechanism, argued for in this thesis, therefore, requires strengthening the already existing alternative dispute settlement mechanisms under the WTO.

The WTO provides for all forms of alternative dispute settlement mechanisms for the settlement of WTO disputes arising between Members. These alternative dispute settlement mechanisms include negotiation, mediation, conciliation, use of good offices, and arbitration. However, rarely have these procedures been utilized for settling WTO disputes arising between Members. It is argued here that lack of detailed procedural rules regulating the conduct of dispute settlement under these mechanisms accounts for this development.

[330]The term 'alternative dispute settlement' is used in contrast to the usual panel and appellate proceedings provided for under the WTO *DSU* for resolving WTO disputes.

ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS UNDER THE WTO DSU

The term 'alternative dispute settlement mechanism' is used broadly here to include consultation, negotiation, mediation, conciliation and arbitration. Excluded from the definition are panel and Appellate Body proceedings under the WTO *DSU*. As stated earlier, the WTO dispute settlement is based on processes evolved under the GATT era for resolving disputes arising under the *GATT 1947*.[331]

The dispute settlement mechanism under the *GATT* was basically the diplomatic process provided for under Articles XXII and XXIII. The emphasis under the GATT DSM was on negotiation and diplomatic settlement of disputes rather than on the provision of an avenue for adjudicating GATT disputes.[332] This development is attributable to the very small number of GATT contracting parties and to the fact that *GATT 1947* was a provisional arrangement to be assimilated under the International Trade Organization.[333]

In comparison to the more formal adjudicatory framework for dispute settlement developed under the panel proceeding, this diplomatic approach could be described as an alternative dispute settlement proceeding. The whole system of dispute resolution provided for under Articles XXII and XXIII was based on negotiation and compromise

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[331]Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (The Hague: Kluwer Law International, 1997) 5 at 35.

[332]Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (United States: Butterworth Legal, 1993) at 29-30.

[333]Ibid.

among the disputing parties rather than on adjudication based on legal principles.[334] Negotiation between the disputing contracting parties, or in conjunction with the CONTRACTING PARTIES, was thus the principal avenue for dispute settlement.

The development of *ad hoc* panel proceedings to investigate complaints and make recommendations to the CONTRACTING PARTIES steered the dispute settlement process in the direction of a more formal adjudicatory process,[335] and that development process assimilated the diplomatic process making consultation a precondition for requesting the establishment of a panel to investigate complaints.[336]

The WTO DSM is built on the GATT process. However, the WTO provides a strengthened adjudicatory dispute settlement mechanism based on rules. The panel and Appellate Body procedures are more formalized and judicial in nature. As argued in preceding chapters, enhancing participation of all Members, especially developing country members, in the WTO system requires strengthening the dispute settlement mechanism by providing a more formalized judicial adjudicatory process.

However, as the system evolved into a more judicial dispute settlement process, it becomes clear that such a formalized adjudicatory dispute settlement process cannot likely effectively resolve certain kinds of disputes. Three kinds of dispute can arise in

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[334]Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (New York: Oxford University, 2003) at 20.

[335]Supra note 332.

[336]Ibid.

relation to WTO rules:[337] (1) violation complaint; (2) non-violation complaints; and (3) situational complaints.[338]

Violation complaints entail allegations of acts or measures that are inconsistent with any of the covered agreements under the WTO or infringement of an obligation assumed under the covered agreement. In that case, there is a presumption that there is nullification or impairment of benefit to the complaining member.[339] Strengthening the dispute settlement mechanism requires that where such a violation is found, an effective mechanism is in place to ensure the cessation of the illegal act and provide compensation for losses suffered.

Unlike violation complaints, non-violation and situational complaints do not entail an illegal act. As such, there is no obligation to cease the act complained against or provide compensation for any loss that might be suffered. Article 26.1(b) provides that where a measure not in violation of a covered agreement is found to nullify or impair benefits, there is no obligation to withdraw the measure. Instead, the panel or Appellate Body is required to recommend that the Members concerned make a mutually satisfactory adjustment.[340]

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[337]Article XXIII.1 *GATT 1994*.

[338]Ernst-Ulrich Petersmann, "Violation and Non Violation Complaints in Public International Trade Law" (1991) 34 German Yearbook of International Law 175.

[339]Article 3.8 *DSU*.

[340]It has been stated that "... WTO Members have approached this remedy with caution and, indeed, have treated as an exceptional instrument of dispute settlement... The reason for the caution is straightforward.

Subjecting non-violation and situational complaints to a strengthened judicial dispute settlement process under the WTO provides no effective outcome where, at the end of the process, the Members concerned are entitled to reach a mutually satisfactory adjustment on their own. Strengthening alternative dispute settlement mechanisms under the WTO provides alternative avenues for Members to use a less adversarial procedure to reach an agreement.

Further, a number of WTO Members may prefer to utilize a less adversarial dispute settlement mechanism to settle trade disputes that may arise between them. Alternative dispute settlement mechanisms are increasingly recognized as alternatives to the adversarial dispute settlement mechanism whose higher costs, longer duration, and political and economic implications are seen as less advantageous to alternative dispute settlement mechanisms.[341] Alternative mechanisms are seen as more flexible, expeditious, confidential and less costly. In addition, avoiding win-lose solutions and focusing on win-win solutions tends to strengthen international relationships.[342] Disputes arising between two developing countries, for instance, may be more effectively settled using an alternative dispute settlement mechanism than by resorting to a more adversarial panel proceeding.

Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules." See *Japan—Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998) WTO Doc. WT/DS44/R, at para. 10.36.

[341]Supra note 328.

[342]Ibid.

It has also been argued that strengthening the alternative dispute settlement procedures under the WTO might help to provide alternative mechanisms for the resolution of trade, environment, and investment disputes in which it would be counter-productive to have a win-lose situation.[343] Illustrating this, Chaytor argues that in the *Shrimp/Turtle Case*[344], it was clear that all disputing parties had an interest in the conservation of the affected turtles. In that case, an alternative dispute settlement process may have assisted to ensure that the US measure was better tailored to protect the turtles while avoiding economic damage to the complainants.[345]

The dispute settlement mechanism under the WTO *DSU* provides for a number of alternative procedures for settling disputes other than the panel proceedings. These are discussed under the following headings: (1) consultation; (2) good offices, conciliation and mediation; and (3) arbitration.

Consultation

As noted, consultation remains the first step in initiating dispute settlement under the WTO. According to Article XXII of *GATT 1994*, "[e]ach contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation

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[343]Beatrice Chaytor, "Reforming Dispute Settlement for Sustainable Development" (December 2002) SUSTRA International Workshop, at 2 online: http://www.ecologic-events.de/sustra/en/documents/BeatriceChaytor.pdf>.

[344]*United States- Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia, etc)* (1998), WT/DS58/AB/R (Appellate Body Report) online: <http://wto.org/wto/dispute/distab.htm>.

[345]Supra note 343.

regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement."[346] Paragraph 2 provides further that "[t]he CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1."

These provisions have been incorporated and elaborated under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*. Article 4 of the *DSU* provides for consultations,[347] specifies a specific time-frame within which to start consultation[348] and a time to reach a satisfactory solution,[349] and requires notification of all requested consultations to the Dispute Settlement Body.[350]

Missing under the *DSU* is the like provision of Article XXII.2 *GATT*, where consultation can be held between disputing parties and CONTRACTING PARTIES (corresponding body under the WTO would be the DSB). One can fairly say that the aim of the consultation proceedings under the *DSU* is to offer the disputing parties the opportunity to enter into bilateral negotiations for the purpose of arriving at a mutually satisfactory solution to the dispute.

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[346]Article XXII.1 *GATT 1994*.

[347]Articles 4.1and 4.2 *DSU*. These provisions substantially reproduce Article XXII of *GATT 1947* (same as that of *GATT 1994*).

[348]Article 4.3. *DSU*.

[349]Ibid.

[350]Article 4.4 *DSU*.

Negotiation as an alternative dispute settlement mechanism offers disputing parties the opportunity to develop a mutually acceptable solution to their dispute. Under the *DSU*, it also operates as notification proceeding to the Member in violation of the existence of the act complained against. Article 4.4 of *DSU* reinstates this position when it provides that "[a]ny request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."

The *DSU* does not, however, provide for mechanisms within which negotiation should take place; this has been left at the discretion of Members. Article 4.1, however, provides that "Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members." The negotiation process is thus left open for parties to adopt procedures that best serve the particular dispute. Flexibility in the process provides advantage for the disputing parties not to be constrained by a particular procedure.

The consultations process thus serves as a notification process for both parties to the dispute and the DSB. In addition, it provides an opportunity for the disputing parties to know each other's position on a particular issue. Article 4.6 further provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." This ensures that positions taken by parties during consultation does not prejudice their rights in panel and Appellate Body proceedings,

thus providing a somewhat congenial atmosphere for the parties to develop a compromise.

As noted earlier, no provisions exist under the *DSU* for the complaining parties to request the DSB to consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through the first bilateral consultation between the disputing Members.[351] Bridging that gap requires providing other alternative dispute settlement mechanisms where parties can further consult with intermediaries to resolve disputes, other than through panel proceedings.

Good Offices, Conciliation and Mediation

These are dispute settlement processes whereby parties to a dispute involve a neutral third party, who is knowledgeable in the subject-area of dispute, to help reach a satisfactory settlement.[352] Unlike consultation or negotiation, good offices, conciliation and mediation dispute settlement procedures involve the use of third parties (which can be an institution) to resolve a dispute, but in a manner which avoids a judgment type-situation in which a binding decision is arrived at by the third party.

It has been noted that a comfortable medium between adversarial and consultation approaches to dispute settlement could be sought in a comprehensive mediation system

[351]Equivalent provision of Article XXII.2 of the *GATT 1994*.

[352]Robert M. Nelson, *Nelson on ADR* (Toronto Ont.: Thomson Carswell, 2003) at 56.

which operates alongside the Panel procedure.[353] The WTO *DSU* provides for this medium under Article 5, "Good offices, Conciliation and Mediation." The provision provides:

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

These dispute settlement procedures have rarely been utilized by WTO Members to date.[354] One factor that may account for this is the historical development of these procedures. The use of good offices, conciliation and mediation in GATT dispute settlement was developed under the *1966 Decision on Procedures under Article XXIII, Applying to Disputes Between a Developing Country Contracting Party and a Developed*

[353]Supra note 323.

[354]Supra note 323.

Country Contracting Party (the *1966 Procedures*).[355] The use of good offices, conciliation and mediation in GATT dispute settlement was to be resorted to in dispute settlement between developed and developing contracting parties after the two are unable to resolve the dispute through bilateral consultation.[356] The use of the process was thus limited to GATT disputes arising between developing and developed country contracting parties.

Moreover, no procedural rules evolved to regulate the process. There are no rules for the appointment of conciliators or mediators, no rules regulating the mediation or conciliation process, no rules on term of reference of mediators or conciliators, no rules on the enforcement of outcomes of conciliation or mediation, etc. Article 5 of the *DSU* only provides that the process is voluntary and requires a stay of request for the establishment of a panel for 60 days to allow the parties to use the process to reach a satisfactory adjustment.

Strengthening the process thus requires more detailed rules to regulate the conduct of conciliation and mediation and the use of good offices to settle WTO disputes. An alternative to providing detailed rules under the WTO is to incorporate institutional rules into the WTO process of conciliation and mediation. A number of international rules and institutions have developed for resolving international commercial disputes through the process of conciliation or mediation. Examples include the use of *UNCITRAL 1978*

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[355] Adopted on 5 April 1966, BISD, 14th Supp., (1967) 18.

[356] Ibid. para. 1.

Conciliation Rules,[357] *International Chamber of Commerce Rules*,[358] the use of International Centre for the Settlement of Investment Dispute,[359] etc.

These institutional rules could be adapted to provide rules for the settlement of WTO disputes between states through conciliation and mediation. Also, the Dispute Settlement Body could provide a list of trade experts for use by the parties in mediation and conciliation procedures for the settlement of disputes arising under the WTO. Strengthening the mediation and conciliation procedures under the WTO provides alternatives to panel proceedings and provides Members with useful and practical avenues to resolve disputes in a less adversarial manner. Disputes arising under non-violation and situational complaints for which parties are to reach satisfactory adjustment on their own could be settled through these procedures.

Arbitration

Article 25 of the *DSU* provides for arbitration as an alternative dispute settlement mechanism to the panel procedure. Article 25 states:

> 1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
> 2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

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[357]UNCITRAL, *UNCITRAL Conciliation Rules* (New York: United Nations, 1977)

[358]*ICC Rules on Commercial Arbitration*, online: ICC <http://www.iccwbo.org/court/english/arbitration>.

[359]The Centre provides rules and institutional framework for the settlement of investment disputes.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutates mutandis* to arbitration awards.

This alternative dispute settlement mechanism provided under the WTO confirms principles already agreed upon in the *1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedure*.[360] However, disputes arising under the GATT/WTO have rarely been settled through the arbitration procedure provided for under the *1989 Decision* or Article 25 *DSU*.[361]

One possible reason that may account for such a development is the lack of comprehensive procedural rules regulating the conduct of arbitration under the WTO dispute settlement system. Petersmann argues that since bilateral arbitration has only rarely been resorted to in GATT practice, the Uruguay Round negotiators preferred to leave it to the parties to agree on the procedures to be followed rather than prescribe detailed arbitration procedures.[362]

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[360]GATT, BISD, 36th Supp., (1989).

[361]Ernst –Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Law International, 1997) at 193.

[362]Ibid.

Hence, lack of detailed arbitration procedures may possibly account for the non-use of arbitration to settle disputes under the WTO. In choosing between subjecting disputes arising under the WTO to panel proceeding and arbitration, WTO Members are more likely to choose panel proceeding since there are already existing detailed procedural rules governing the proceedings. This may be in spite of parties' preference to settle the dispute through arbitration. Under the WTO *DSU*, there are no rules on the appointment of arbitrators, term of reference of arbitrators, conduct of arbitration proceedings, etc.

In contrast, disputes arising under bilateral trade and investment agreements, and in some cases regional trade agreements, are mostly resolved through international arbitration. It has been noted that most bilateral investment treaties (BITs) require that state-to-state disputes be settled by consultations, failing which it is submitted for arbitration.[363] The *North-American Free Trade Agreement* (*NAFTA*) provides for the settlement of disputes among parties through arbitration.[364] The use of arbitration dispute settlement processes under these agreements can be attributed to the availability of rules regulating the conduct of arbitration proceedings. Where there are no such procedural rules, some arbitration institutional rules are incorporated to regulate the proceeding.[365]

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[363]TRADE AND INVESTMENT: DISPUTE SETTLEMENT ISSUE PAPER, online: <http://www.cuts-india.org/Dispute%20Settlement.doc>.

[364]Chapters 11 and 20, *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1947 No. 2, 32 I.L.M. 289, online: <http://www.dfait-maeci.gc.ca/nafta-alena/settle-en.asp>.

[365]Article 2022.3 *NAFTA*.

There is, therefore, a need to strengthen the arbitration proceedings under the WTO DSM by providing detailed rules regarding the appointment of arbitrators, term of reference of arbitration, conduct of arbitration proceedings, etc. Alternatively, some institutional rules could be incorporated for use by parties to the arbitration or the WTO Dispute Settlement Body can make use of established arbitration institution.

One notable feature recognized under Article 25 is the multilateral character of WTO disputes. Article 25.2 thus requires that "agreements to resort to arbitration shall be notified to all Members sufficiently in advance of actual commencement of the arbitration process" so as to enable third WTO members to become a party to the arbitration subject to the agreement of the parties who have agreed to have recourse to arbitration.[366]

In addition, Article 25 provides for the enforcement of arbitration awards by prescribing that Articles 21 and 22 of the *DSU* are applicable to arbitration awards as they apply to panel or Appellate Body recommendations. In that regard, arbitration awards are enforceable in the same way as panel recommendations.

[366] Article 25.3 *DSU*.

CONCLUSION

As the dispute settlement process under the WTO becomes more judicial in nature, there is the need to strengthen alternative dispute settlement procedures that are less adjudicative in nature. The WTO dispute settlement provides for all forms of alternative dispute settlement mechanisms, from bilateral consultation, good offices, conciliation, mediation to arbitration. However, sustaining a judicial dispute settlement mechanism under the WTO DSM requires strengthening these alternative dispute settlement mechanisms.

Such alternative dispute settlement mechanisms are more suited and effective for settling certain kinds of disputes arising under the WTO that do not require legally binding judicial decisions but mutually satisfactory adjustment by the parties. This includes disputes falling under non-violation and situational complaints, that do not involve illegal activities. In other instances, some WTO Members may prefer to settle disputes arising between them through a non-adjudicative proceeding.

However, the alternative dispute settlement mechanisms provided under the WTO are rarely used by WTO Members. This is because these alternative mechanisms lack procedural rules to regulate settlement proceedings. Parties are left to determine their own rules to regulate their activities during the settlement proceedings.

Strengthening the dispute settlement mechanisms under the WTO, therefore, requires strengthening the alternative dispute settlement mechanisms provided alongside the panel

and Appellate Body procedures. This requires providing detailed procedural rules to regulate proceedings during mediation, conciliation and arbitration.

CONCLUSION

The dispute settlement mechanism provided for under the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* is a vital factor in the operation of the multilateral trading system created under the WTO. Effective functioning of a rule-based multilateral trading system depends on an effective DSM to resolve the disputes that are bound to arise in the application and operation of the rules.

The WTO dispute settlement process, built on the GATT process, provides a more judicial outlook to international trade dispute settlement; provides a formal institutional base and a unified system for dispute settlement under the WTO. In addition, the WTO DSM provides a more effective time-frame for dispute settlement and avoids the delays that were encountered under the GATT. More importantly, the process is more automatic in the sense that no single member has the power to veto a request by another member to establish a panel, to adopt a recommendation, or to request the suspension of a concession. Further, the WTO dispute settlement process provides for an appellate system where parties to a dispute can appeal panel findings to a standing Appellate Body. The WTO, therefore, provides a much more strengthened judicial dispute settlement mechanism than did the process under the GATT system. The dispute settlement mechanism under the WTO is more rule-oriented and less power-oriented than was the system under the *GATT*.

A rule-oriented, judicial DSM provides a more effective mechanism for developing countries' participation. As argued in chapter two and three, certain aspects of the WTO

DSM do, however, fall short of the judicial dispute settlement mechanism required for equal and effective participation by developing countries. The effectiveness of remedies and enforcement mechanisms provided under the WTO DSM still depends on power-related factors that developing countries are unable to exert to ensure compliance with WTO rules. The rules on third party intervention and rights in the dispute settlement process are inadequate for effective third party participation in the dispute settlement process. The inter-state nature of dispute settlement under the WTO dispute settlement mechanism brings with it a power politics that plays to the disadvantage of developing countries in dispute settlements.

Strengthening the WTO DSM to provide a much more judicial dispute settlement mechanism, for equal and effective participation by developing countries, requires reforming these areas under the WTO dispute settlement system. As pointed out, there is the need to develop remedies that cater for past and future economic damage caused by violation of WTO obligations. Enforcement mechanism, devoid of power-related factors, should be provided, to make it possible for economically weaker countries to enforce their rights under the WTO against stronger developed countries. Therefore, there is the need for a more binding panel or Appellate Body ruling authorizing specific mode of implementation that satisfies the general recommendation for bringing violating measures into conformity with WTO obligations; there is also the need for a more effective compensation scheme; and lastly, there is the need for a collective enforcement procedure to prevent unilateral responses to violation of WTO rules that put developing countries at a disadvantage. These reforms may lead to the possible downside where state and

government authorities are undermining. However, since the workings of the panel or Appellate Body are subject to adoption by the DSB, the effect of this possible downside is minimized.

Article 10 of the DSU provides that the interest of other Members under a covered agreement at issue in the dispute should be taken into account during the panel process. The interest of third parties cannot be fully taken into account given the limited procedural rights granted in dispute settlement process with no substantive rights to ensure compliance with recommendation. As most developing countries participate in dispute settlement process as third parties, they are more affected by these limitations. The scope of third parties' participation in disputes and right to enforce recommendation need to be extended. The possible downsides of granting broader participatory rights to third parties are that it may complicate judicial proceedings and distract the focus away from the immediate parties. Panel proceedings where enhanced third party rights have been granted however downplay such suggested downsides.

Inter-state DSM under the WTO comes with political manoeuvres that put developing countries are the receiving end. However, the present political and economic commitments of WTO Members and the likely downsides of private participation provide strong arguments against granting access to private parties at the level of WTO DSM. However, private parties' participation in WTO dispute settlement process under domestic settings should be developed to limit political influence on the dispute settlement process. Under this model, states retain their present control under the WTO

DSM. At the same time, WTO rules are reduced to truly commercial agreements regulating international trade where the economic actors have a right of action. This decreases the need to resort to high-level political manoeuvres at the level of WTO DSM to bring about compliance in case of violation of WTO rules.

As the WTO dispute settlement becomes more judicial in nature (through the possible implementation of these recommendations), alternative mechanisms are needed for dispute settlement, particularly as regards those disputes that do not involve violation of any WTO agreement. The WTO dispute settlement mechanism provides for the use of good offices, conciliation, mediation, and arbitration as alternative mechanisms to panel proceedings for settling WTO disputes. These alternative mechanisms lack procedural rules for the conduct of dispute settlement. To sustain a much more strengthened judicial dispute settlement mechanism under the WTO, as argued for here, requires providing detailed procedural rules for use by parties that choose to utilize less adversarial adjudicating process to settle their disputes. These alternative dispute settlement mechanisms under the WTO DSM sustain and compliments a stronger judicial DSM required for effective participation by developing countries.

Proposals for reforming the operation of the *DSU* to enhance effective participation of developing countries will maintain the balance of rights and obligations negotiated during the Uruguay Round. These shortfalls in the present operation of the *DSU* equally affect developing countries where the contest is between them and a developed country. There is, therefore, the need for coordination among developing countries to bring about needed

change in the *DSU*. In fact, developing countries can expect a much better response to their proposals from their developed country trading partners if they support each other and act in concert during the review process. The unified front presented by developing countries during the present renegotiation of agreements on agriculture at the Doha Round attest to this assertion.

There is presently an ongoing review of the *Dispute Settlement Understanding* by the Dispute Settlement Body. Most of the suggestions discussed above have been put up by member states to strengthen the DSM under the WTO. The effective operation of the multilateral trading system created under the WTO depends on a much more strengthened dispute settlement mechanism than that presently existing. The best way forward is to provide a more strengthened judicial framework for dispute settlement by implementing these recommendations and proposals.

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